Anne Pilsbury
ATTORNEY AT LAW
17 Danforth Street - Norway, Maine 04268

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CENTER LOVELL
207 / 925-1144

Date: Feb. 26, 1982

RE: HOBSON v WILSON]

DOCKET NO. 76-1326

DEAR CLERK:

Enclosed for filing please find the following court pleading:

Statement of Plaintiffs in Respect to Motion to Withdraw by Two Plaintiffs' Counsel
Also enclosed is the necessary filing fee in the amount of n/a

Filed pursuant to order of Court Feb. 4, 1982.

Thank you.

ANNE PILSBURY, Esq.

Enc.
Copy to: all counsel

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., PLAINTIFFS V JERRY WILSON, et al., DEFENDANTS	)	Civil Action No. 76-1326

STATEMENT OF PLAINTIFFS IN RESPECT TO MOTION TO WITHDRAW BY TWO OF PLAINTIFFS' COUNSEL

The following plaintiffs, who have been authorized to act in this matter on behalf of all plaintiffs, wish to inform the Court that the plaintiffs understand that Daniel Schember, Esq. and J.E. McNeil, Esq., who acted as two of three trial counsel for plaintiffs, have moved for leave to withdraw from the case. The plaintiffs have no objection to the request and feel that their interests on the few matters still remaining before the Court will be adequately represented by remaining counsel of record.

Tina C. Hobson
TINA HOBSON

Abraham Bloom
ABRAHAM BLOOM

Richard Pollock
RICHARD POLLOCK

Date: February 25, 1982

Anne Pilsbury
ANNE PILSBURY, ESQ.
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Herb Semmel
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Of Counsel:

Arthur Spitzer, Esq.
Executive Director,
American Civil Liberties Union
Fund of the National Capital Area
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(202) 544-1076

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANTS BRENNAN, MOORE, JONES, PANGBURN, AND GRIMALDI FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

The memorandum of points and authorities filed by the federal defendants on January 4, 1982, adequately states the legal and factual basis for their motion to set aside the verdict. These arguments have not been refuted by plaintiffs' memorandum in opposition; however, the federal defendants have the following comments in response to certain matters addressed by plaintiffs.

A. The Verdict Was Not Based On The Evidence

The jury found that each of the five federal defendants had by individual conduct injured each of the eight plaintiffs awarded damages.[1/] Furthermore, the jury found that each defendant's conduct caused equal injury to each of the eight plaintiffs; for example, the jury found that by individual conduct defendant Pangburn caused injury compensable in the amount of $3750 to each of the eight plaintiffs.

No evidence or reasonable inferences justify these findings. In their memorandum in support of the instant motion, pages 14 to 16, federal defendants describe the totality of the evidence regarding individual conduct by defendants affecting any plaintiff. The evidence cannot be construed in any reasonable way to support a finding, for example, that

1/ Plaintiff Washington Area Women Strike for Peace was awarded nothing. It argues in its motion for judgment notwithstanding the verdict that the jury could not have rightfully distinguished on the basis of the evidence between the claims of the Washington Peace Center, which was awarded $93,750, and its claims. This argument is an elegant admission in support of defendants' position that the jury based its conclusions on something other then the evidence and that the verdict in favor of plaintiffs should be set aside.

defendant Pangburn committed any act affecting plaintiff Pollack, Waskow, Bloom, Abbott, Hobson, Eaton, or the Washington Peace Center; that defendant Moore committed any act affecting plaintiff Pollock, Waskow, Bloom, Abbott, Hobson, Booker, or the Washington Peace Center; that defendant Grimaldi committed any act affecting plaintiff Waskow, Bloom, Abbott, Hobson, Eaton, Booker, or the Washington Peace Center; that defendant Brennan committed any act affecting plaintiff Pollock, Hobson, Eaton, Booker, or the Washington Peace Center; or that defendant Jones committed any act affecting any plaintiff. The individual conduct that was proven, such as defendant Pangburn's brief encounter with plaintiff Booker, defendant Brennan's middle-level approval of sending a newspaper article to plaintiffs Waskow, Bloom, and Abbott, or defendant Grimaldi's preparation of the Rational Observer about which plaintiff Pollock complained, was not of a type which could reasonably be said to have caused constitutional injury to these plaintiffs.

Plaintiffs do not in their opposition to the instant motion attempt to rationalize the jury's finding that each defendant by individual conduct injured each plaintiff; rather, plaintiffs argue that the evidence supported the finding that the five federal defendants participated in a conspiracy to violate plaintiffs' rights. Plaintiffs' analysis of the evidence, however, confirms the federal defendants' argument that the only thread binding the defendants together was common employment and not a conspiratorial agreement. Furthermore, as the plaintiffs must concede, the overwhelming bulk of the evidence of so-called overt acts related to matters in which no defendant personally participated and about which no defendant had any personal knowledge; yet, no evidence was presented to establish that the persons actually involved were in fact "co-conspirators" other than in the sense that they also were employed by the Federal Bureau of Investigation.

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https://archive.org/details/box54_pleading-v1

There being no evidence to support the finding of individual conduct injuring plaintiffs or the existence of an illegal conspiracy, the verdict in favor of plaintiffs should be set aside.

Defendant Jones Is Entitled To Judgment In His Favor

Plaintiffs continue to argue that their unexplained late service of process on defendant Courtland Jones does not justify dismissal of the claims against him. The following comments seem appropriate:

1. Plaintiffs note that the defense made by defendant Jones at trial did not differ significantly from the defenses by the other federal defendants. Considering that defendant Jones was deprived of all opportunity to engage in discovery and to utilize other pretrial procedures, such as submission of dispositive motions, the absence of a unique defense is not surprising. Furthermore, plaintiffs' argument that defendant Jones' trial performance proved he was not prejudiced by late service is a confusion of the correct method of resolving this issue. No authority cited in favor of or in opposition to defendant Jones' position on this matter suggests that the Court decides whether a defendant has been prejudiced by requiring the defendant to submit to trial and then analyzing the quality of his performance.[2/]

2. By order of November 14, 1980, this Court directed that the parties should "propose a practical solution for the problem posed by the [plaintiffs'] failure to effect service on a number of defendants." By letter of November 25, 1980, counsel for federal defendants suggested that dismissal of the unserved defendants for failure to prosecute would be appropriate.

2/ It is of particular interest to defendant Jones that at the last pretrial conference, November 20, 1981, the Court encouraged plaintiffs to withdraw their claims against defendant Jones rather than risk reversal by the Court of Appeals.

Plaintiffs were ordered to respond to this suggestion in writing by December 15, 1980. Their response was that the Court need do nothing. They implied that the Court should wait until such time as they served someone and the issue could be resolved in the context of a concrete dispute. They then undertook discovery, including taking Mr. Jones' deposition as a witness, concluded they wished to prosecute the action against him, and deliberately delayed service of process until such time that Mr. Jones would be unable to engage in normal pretrial practice. Plaintiffs thus flouted this Court's interest in promptly resolving the issue of the unserved defendants and they grievously abused defendant Jones' rights as a litigant.

Plaintiffs have steadfastly refused to explain why they could not have served the defendant in a timely fashion, and their conduct should not be condoned.

III. The Action Is Barred by The Statute Of Limitations

The federal defendants have thoroughly explained their position on the issue of the statute of limitations and desire, in this memorandum, to re-emphasize only one point. Plaintiffs' counsel have argued before the Court in several conferences and hearings and to the jury in their closing argument that until the publication of the Church Committee Report in April, 1976, the plaintiffs did not have sufficient information to lead them to believe they had a cause of action. The jury's inquiry to the Court on December 18, 1981, during the deliberations demonstrated that it was clearly impressed by this argument. There is evidence demonstrating, however, that the argument was not only false but a conscious effort to mislead:

1. No testimony by any plaintiff suggested that any plaintiff was influenced by, or even aware of, the Church Committee Report prior to commencement of the action.

2. The decision to file this action was made by at least some of the plaintiffs several months prior to publication of the Report [See Memorandum By Federal Defendants In Opposition

To Plaintiffs' "Motion For Reconsideration" And In Response To The Court's OrderOf October 29, 1981, at 3-4, with attached exhibits];

3. Plaintiffs' counsels' motion for attorneys fees, particularly the affidavit of Anne Pilsbury and the statement in behalf of the late David Rein, demonstrates activity by counsel several months prior to April, 1976. Significantly, no mention of the Church Committee Report, such as review of the Report by counsel, is made prior to commencement of the action.

IV. Defendants Were Prejudiced By Misconduct Of Plaintiffs' Counsel

Plaintiffs argue with respect to their communication with the excused juror that (1) defendants were not prejudiced; (2) the Court had not ordered her not to speak to anyone about the case, (3) the local rules do not prohibit such communication, (4) logic does not require such a prohibition, (5) a local rule prohibiting communication with an excused juror would be contrary to the First Amendment, and (6) defendants had as much opportunity as plaintiffs to communicate with the excused juror.

The federal defendants have previously described the prejudice they suffered because of plaintiffs' counsels' misconduct and have nothing further to add.[3/]

Whether the Court instructed the excused juror not to talk to anyone about the case is easily resolved by referring to the transcript of the chambers conference which occurred on December 3, 1981. The transcipt is being prepared and will soon be made available to the Court. Federal defendants are confident the transcript will show the Court did issue such an instruction in

---

3/ Plaintiffs suggest that the excused juror's information and insight could have been of minimal value to them and could have caused no prejudice to defendants, because she served only a limited time on the jury, the other jurors were of a different race, and only final arguments remained. This suggestion is a rather curious rationalization for their conduct, however, for these circumstances were known to them prior to the communication. It seems clear that plaintiffs believed she and the other juror whom they attempted to contact could provide valuable information or they would not have defied the order prohibiting such communication.

the presence of, among others, plaintiffs' counsel Anne Pilsbury. In addition, the transcript of a bench conference on December 16, 1981, which is also being prepared, will show that plaintiffs' counsel apologized for the attempt to communicate with the alternate juror excused on December 14, and she further stated that no violation of the local rule had occurred because no actual communication had occurred; however, plaintiffs' counsel failed to advise the Court that there had been a conversation with the juror excused on December 3. Federal defendants believe this failure was not inadvertent. Finally, the transcript of the statement of Mary Pike, December 18, 1981, will show that plaintiffs' counsel were aware that the juror had been instructed not to talk to anyone about the case.

Whether Rule 1-28 of this Court prohibits communication with an excused juror is a matter of interpretation. In any event, the rule certainly does not expressly permit such communication, and since the rule rigidly controls communications between counsel and discharged jurors, it is reasonable to assume that communication with an excused juror, particularly while trial is continuing, would be of interest to the Court. Plaintiffs raise the question whether there would be any logic to support a prohibition against an excused juror communicating with counsel during the course of trial. Other questions occur to federal defendants: Is counsel entitled to know how the evidence is being perceived by the jury? Whether there are jurors with particular interests, idiosyncracies, bias, or proclivities which could be manipulated to party's benefit by presentation of evidence or by argument? Whether any juror has revealed sympathy or hostility to a particular witness, party, attorney, or the judge? Whether a particular juror has displayed ability to influence other jurors? And finally, is counsel entitled to receive this information from one who sat on the jury and thus held a position equal in importance and sanctity to the judge on the case? Federal defendants suggest that the answers to these and other questions will embody the logic or illogic of any prohibition.

The plaintiffs suggest further that a prohibition against communications between an excused juror and counsel would be violative of the First Amendment. It is unclear, however, how this prohibition would be any more offensive to the Constitution than other restrictions on speech designed to protect the integrity and sanctity of trial by jury, which is also a right protected by the Constitution.

Finally, plaintiffs' statement that the excused juror was as available to the defendants as she was to the plaintiffs is simply wrong. Defendants, unlike plaintiffs, chose to abide by the rules and orders of this Court and, accordingly, the unique insights and information of the excused juror were not available to the defendants.[4/]

CONCLUSION

For the foregoing reasons as well as the reasons stated in their first memorandum, the federal defendants are entitled to judgment notwithstanding the verdict or, in the alternative, to a new trial.

Respectfully, submitted,

J. PAUL McGRATH
Assistant Attorney General

STANLEY S. HARRIS
United States Attorney

BROOK HEDGE

DAVID H. WHITE

Attorneys, Department of
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10th & Penn. Ave. N.W.
Washington, D.C. 20530
Tel: (202) 633-4269

Attorneys for defendants
Brennan, Grimaldi, Moore,
Jones, and Pangburn

3/ Federal defendants have noticed that in plaintiffs' motion for attorneys' fees, one Richard Seltzer and one Margie Fargo have claimed $2800 and $500, respectively, for "Jury Project Consultation". This amount of money implies a significant expenditure of time. In light of circumstances that have come to light regarding plaintiffs' communication with excused jurors, the federal defendants believe they are entitled to know whether the "Jury Project" involved any investigation of or interviews of jurors, potential jurors, or their families, friends, and neighbors.

CERTIFICATE OF SERVICE

I hereby certify on this 19th day of February, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Reply Memorandum In Support of Motion By Defendants Brennan, Moore, Jones, Pangburn, and Grimaldi For Judgment Nowithstanding The Verdict Or, In The Alternative, For A New Trial.

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CENTER LOVELL
207 / 925-1144

Date: February 10, 1982

Clerk, U.S. District Court
3rd & Constitution Avenue
Washington, D.C.

RE: Hobson, et al., v Wilson, et al.

DOCKET NO. 76-2631

DEAR CLERK:

Enclosed for filing please find the following court pleading:
Memorandum of points and Authorities in Opposition to District of Columbia Defendants' Motion for Judgment Notwithstanding the Verdict or, Alternatively, For a New Trial or Remittitur

Also enclosed is the necessary filing fee in the amount of _____

Thank you.

ANNE PILSBURY, Esq.

Enc.
Copy to: Hon. Louis F. Oberdorfer

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs	)	
v	)	
JERRY V. WILSON, et al., Defendants	)	Civil Action No. 76-2631

ORDER

Upon consideration of the federal defendants' motion for judgment notwithstanding the verdict, a new trial, it is this day of , 1982 hereby ordered that the same hereby is denied.

JUDGE, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :

Plaintiffs :

v. : Civil Action No. 76-1326

JERRY WILSON, et al. :

Defendants :

OPPOSITION OF DISTRICT OF COLUMBIA DEFENDANTS TO PLAINTIFFS' SECOND MOTION FOR AN EXTENSION OF TIME TO RESPOND TO POST-TRIAL MOTIONS

The District of Columbia defendants oppose plaintiffs' second motion for an extension of time to respond to post-trial motions on the following grounds:

1. Pursuant to the time requirements set forth in the Federal Rules of Civil Procedure the District of Columbia defendants filed their post-trial motions on January 1, 1982, 9 days after the judgment was entered against them.

2. On or about January 15, 1982, counsel for the plaintiffs' contacted counsel for the District defendants requesting consent to a two week extension of time to respond to the District of Columbia defendants post-trial motions. Counsel for the District defendants consented to plaintiffs' request, but indicated that the District defendants would not consent to any further extensions. Plaintiffs then moved for an extension of time until January 29, 1982, to file their response to defendants' post-trial motions. Consistent with its promise, the District defendants did not oppose that motion, even though it was opposed by the Federal defendants.

3. On January 6, 1982, plaintiffs filed their own post-trial motion. The District of Columbia defendants timely responded to plaintiffs post-trial motion.

4. On January 28, 1982, plaintiffs filed a motion requesting a second extension of time to respond to the defendants' post-trial motions. This time plaintiffs have asked for 30 days, thus requesting a total of 45 days to respond to the defendants' post-trial motions.

5. The District of Columbia defendants oppose plaintiffs request for an additional extension of time, since it would clearly be inequitable to require the District defendants to file their post-trial motion within 10 days after judgment and permit plaintiffs to have 45 days to assemble a response.

JUDITH W. ROGERS
Corporation Counsel, D.C.
JOHN H. SUDA
Deputy Corporation Counsel, D.C.
LAURA W. BONN
Assistant Corporation Counsel, D.C.
Attorneys for District of Columbia
Defendants
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Washington, D.C. 20004
727-6348
GEORGE N. BARCLAY
Assistant Corporation Counsel, D.C.
Attorneys for District of Columbia
Defendants
District Building
Washington, D.C. 20004

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of the District of Columbia Defendants to Plaintiffs' Second Motion for an Extension of Time to Respond to Post-Trial Motion, together with Memorandum of Points and Authorities in Support thereof and Order was mailed, postage prepaid, to Daniel M. Schember, Esq., 1712 N Street, N.W., Washington, D.C. 20036; Ann Pilsbury, 17 Danforth Place, Morway, Maine 02468, Attorneys for Plaintiffs, and David White, Esq., Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 1st day of February, 1982.

Laura W. Brown

Assistant Corporation Counsel, D.C.
Attorney for District of Columbia
Defendants
District Building
Washington, D.C. 20004

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.	:	
Plaintiffs	:	
v.	:	Civil Action No. 76-1326
JERRY WILSON, et al.	:	
Defendants	:	

ORDER

Upon consideration of the opposition of District of Columbia defendants to plaintiffs' motion for a second extension of time to respond to post-trial motions, the memorandum of points and authorities filed in support thereof, the opposition thereto, and the entire record herein, it is, by the Court, this____day of_____, 1982,

ORDERED: That the motion of plaintiffs for a second extension of time to respond to post-trial motions, and the same is, hereby denied.

_____
JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY WILSON, et al.,

Defendants.

Civil Action No. 76-1326

FILED

FEB - 3 1982

JAMES F. DAVEY, Clerk

ORDER

A status call was held in this action on February 3, 1982, at which time the Court discussed with the parties submission of papers opposing defendants' motions for judgment notwithstanding the verdict or for new trial and plaintiffs' application for attorneys' fees. To prevent undue delay in disposition of all post-trial motions and applications, it is this 3d day of February 1982 hereby

ORDERED: That plaintiffs shall file on or before February 12, 1982, at 4:30 p.m., their opposition to defendants' motions for judgment notwithstanding the verdict or for new trial; and it is further

ORDERED: That defendants may reply to plaintiffs' opposition to the motion for judgment notwithstanding the verdict on or before February 19, 1982, at 4:30 p.m.; and it is further

ORDERED: That defendants shall file on or before February 26, 1982, at 4:30 p.m., their response to plaintiffs' application for attorneys' fees.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

OPPOSITION BY FEDERAL DEFENDANTS TO PLAINTIFFS' MOTION FOR SECOND EXTENSION OF TIME IN WHICH TO OPPOSE DEFENDANTS' POST-TRIAL MOTIONS

The jury returned its verdict in this action on December 23, 1981. This Court acted promptly to cause the judgment to be entered on that day, thereby necessitating that motions pursuant to Rule 50, Federal Rules of Civil Procedure, be filed by January 4, 1982. Under the federal rules, the Court cannot enlarge the time within which post trial motions must be filed; however, through successive motions for enlargement, plaintiffs are seeking a total of fifty-six days to file their opposition to defendants' motions.

Although there appears to be some intramural dispute among their counsel, plaintiffs have not demonstrated good cause for the time they are seeking. Plaintiffs' lead trial counsel remains in this action, and she has suffered no impediment to preparing the opposition that is greater or more unusual than the difficulties experienced by defendants' counsel in preparing the motions.

Noting simply that eight weeks to prepare papers would have been a luxury they would have greatly enjoyed and fully appreciated, the federal defendants respectfully suggest that an enlargement of time to March 1, 1982, for plaintiffs to respond to defendants' motions is not warranted.

Respectfully, submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F.C. RUFF
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Brook Hedge
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Attorneys for federal
defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter having come before the Court on motion by plaintiffs for enlargement of time to March 1, 1982, within which to oppose defendants' motions for judgment notwithstanding the verdict or for new trial, and the Court being fully advised in the premises, it is this _____ day of _____, 1982,

ORDERED that the motion be, and hereby is, denied, except that plaintiffs shall have to and including February 8, 1982, within which to oppose defendants' post trial motions.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 1st day of February, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Opposition By Federal Defendants To Plaintiffs Motion For Second Extension of Time In Which To Oppose Defendants' Post-Trial Motions, and proposed Order.

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DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs,	)	
v.	)	Civil Action No. 76-1326
JERRY WILSON, et al., Defendants.	)	

MOTION FOR SECOND EXTENSION OF TIME IN WHICH TO OPPOSE DEFENDANTS' POST-TRIAL MOTIONS

Plaintiffs move the court for an order extending to and including February 28, 1982 the time in which they may file their opposition to defendants' post-trial motions. In support of this motion plaintiffs rely on the accompanying memorandum.

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J. E. McNeil
J. E. McNeil

Of Counsel:

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Washington, D.C. 20009
(202) 265-9500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs,	)	
v.	)	Civil Action No. 76-1326
JERRY WILSON, et al., Defendants.	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR SECOND EXTENSION OF TIME IN WHICH
TO OPPOSE DEFENDANTS' POST-TRIAL MOTIONS

Plaintiffs previously sought an extension until January 29, 1982, due to the work load of plaintiffs' Washington, D.C. attorneys, who assumed primary responsibility for preparing plaintiffs' opposition.

Plaintiffs' Washington-based attorneys, however, must immediately withdraw from further participation in this case. Praecipes noting the withdrawal of J. E. McNeil and Daniel M. Schember accompany this motion. Plaintiffs' attorney in Maine, Anne Pilsbury, is remaining on the case and will prepare and argue plaintiffs' opposition to the defendants' post-trial motions. Ms. Pilsbury requires the requested extension of time to draft plaintiffs' memoranda.

Plaintiffs are actively seeking new Washington-based attorneys to serve as co-counsel in this case.

Respectively submitted,

Anne Pilsbury
Anne Pilsbury
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Norway, Maine 02468
(207) 925-1144

J. E. McNeil

Daniel M. Schember
Gaffney, Anspach, Schember,
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Of Counsel:

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Herb Semmel
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Antioch School of Law
Washington, D.C. 20009
(202) 265-9500

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 76-1326
	)	
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter having come before the court on plaintiffs' Motion for Second Extension of Time in Which to Oppose Defendants' Post-Trial Motions, and it appearing this motion should be granted, it is this _____ day of _____, 1982

ORDERED that plaintiffs' motion is granted and plaintiffs shall have until February 28, 1982 in which to file their opposition to defendants' post-trial motions.

_____
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
JERRY WILSON, et al.,	)
	)
Defendants.	)

PRAECIPE

The Clerk will withdraw the appearance of Daniel M. Schember as co-counsel for plaintiffs.

Daniel M. Schember

Daniel M. Schember
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
Attorneys at Law
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Washington, D.C. 20036
(202) 223-9274

Co-Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 76-1326
	)	
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

PRAECIPE

The Clerk will withdraw the appearance of J. E. McNeil as co-counsel for plaintiffs.

S. E. McNeil

J. E. McNeil
Gaffney, Anspach, Schember
Klimaski & Marks, P.C.
Attorneys at Law
1712 N Street, N.W.
Washington, D.C. 20036
(202) 223-9274

Co-Counsel for Plaintiffs

Certificate of Service

I certify that a copy of the foregoing Motion for Second Extension of Time in Which to Oppose Defendants' Post-Trial Motions, supporting memorandum, proposed order, and praecipes noting the withdrawal of J. E. McNeil and Daniel M. Schember, was mailed postage prepaid this 27th day of February, 1982 to David H. White, Civil Division, Department of Justice, Washington, D.C. 20530 and Laura Bonn, Assistant Corporation Counsel, District of Columbia Building, 14th & E Streets, N.W., Washington, D.C. 20004.

Daniel M. Schember

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,
v.
JERRY WILSON, et al.,
Defendants.

Civil Action No. 76-1326

FILED
JAN 29 1982
JAMES F. DAVEY, Clerk

ORDER

The Court is in receipt of plaintiff's motion for an extension of time to oppose defendants' post-trial motions and local counsel's submission, styled a praecipe, seeking to withdraw their appearances for the balance of the proceedings in this action. To permit the parties to advise the Court more fully on the scheduling of post-trial motions and on the submission filed by plaintiffs' local counsel seeking to withdraw their appearances, see Local Rule 1-4(c)(3), it is this 29th day of January 1982 hereby

ORDERED: that a status call be held in this action on February 3, 1982 at 9.30 a.m.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 76-1326
JERRY WILSON, et al.,	:	
Defendants.	:	

FILED
JAN 29
JAMES F. DAVEY, Clerk

SUPPLEMENTAL ORDER OF JANUARY 29, 1982

The Order earlier entered this date is supplemented by a provision that it is this 29th day of January 1982 hereby

ORDERED: That all counsel of record shall attend the hearing scheduled for 9:30 a.m., February 3, 1982.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE
5:00 P.M.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs, v. JERRY WILSON, et al., Defendants.	)	Civil Action 76-1326

MOTION BY FEDERAL DEFENDANTS FOR ENLARGEMENT OF TIME TO RESPOND TO PLAINTIFFS' MOTION FOR ATTORNEYS FEES

Defendants Charles D. Brennan, George C. Moore, Courtland Jones, Gerould Pangburn, and Gerald T. Grimaldi, through their undersigned counsel and pursuant to Rule 6 of the Federal Rules of Civil Procedure, move for an enlargement of time to respond to plaintiffs' motion for attorneys fees until ten days after disposition of defendants' pending motions for judgment notwithstanding the verdict.

In support of this motion the defendants rely upon the attached memorandum of points and authorities.

Respectfully, submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F.C. RUFF
United States Attorney

BROOK HEDGE

DAVID H. WHITE

Attorneys, Department of
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Tel: (202) 633-4269

Attorneys for defendants
Brennan, Grimaldi, Moore,
Jones, and Pangburn

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION BY FEDERAL DEFENDANTS FOR ENLARGEMENT OF TIME TO RESPOND TO PLAINTIFFS' MOTION FOR ATTORNEYS FEES

Following entry of judgment in favor of plaintiffs in this action, the federal defendants moved on January 4, 1982, for judgment notwithstanding the verdict or, in the alternative, for new trial. The plaintiffs have not yet filed their response to this motion or to the similar motion filed by the District of Columbia defendants. In addition, a motion by defendants for mistrial is also pending.

Inasmuch as the issue of attorneys fees turns on the issue of who is the "prevailing party", 42 U.S.C. §1988, it would be appropriate for the Court to defer briefing of the attorneys fee motion until such time or the motions on the merits are determined.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F.C. RUFF
United States Attorney

BROOK HEDGE

DAVID H. WHITE

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Attorneys for defendants
Brennan, Grimaldi, Moore,
Jones, and Pangburn

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter having come before the Court on motion by defendants Brennan, Moore, Jones, Pangburn, and Grimaldi for an enlargement of time within which to respond to plaintiffs' motion for attorneys fees, and the Court being fully advised in the premises, it is this ____ day of _____ 1982,

ORDERED that the motion be, and hereby is, granted, and that the federal defendants shall have ten days following disposition of their motion filed January 4, 1982, to set aside the verdict within which to respond to plaintiffs' motion for attorneys fees.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 21st day of January, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Motion By Federal Defendants For Enlargement Of Time To Respond To Plaintiffs' Motion For Attorneys Fees, accompanying memorandum of points and authorities, and proposed Order.

Herb Semmel, Esquire
Urban Law Institute for the
Antioch School of Law
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Washington, D.C. 20004

Daniel Schember, Esquire
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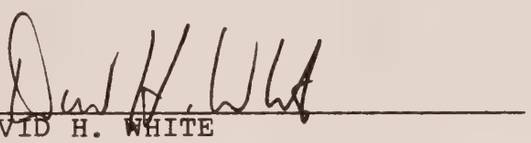

DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,

Plaintiffs,

v.

JERRY WILSON, et al.,

Defendants.

Civil Action
76-1326

FILED

JAN 8 1982

JAMES F. DAVEY, Clerk

ORDER

This cause having come before the Court on motion by defendants Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould W. Pangburn, and Gerald T. Grimaldi for stay of execution of, or stay of proceedings to enforce, the judgment entered in favor of plaintiffs on December 23, 1981, and the Court being fully advised in the premises, it is this 8th day of January, 1982,

ORDERED that the motion be granted and that execution of, or any proceedings to enforce, said judgment be, and hereby is, stayed until disposition of the aforesaid defendants' motion for judgment notwithstanding the verdict or, in the alternative, for new trial.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

(2)

Form A. O. 133 (4/76)

BILL OF COSTS

United States District Court
for the

District of Columbia

Hobson, et al.,
Plaintiffs
vs.
Wilson, et al.,
Defendants

CIVIL ACTION FILE NO. 76-1326

Judgment having been entered in the above entitled action on the twenty-third day of December, 1981, against defendants the clerk is requested to tax the following as costs:

BILL OF COSTS

Fees of the clerk	$ 10.00
Fees of the marshal	369.88
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	3.00
Fees and disbursements for printing	
Fees for witnesses (itemized on reverse side)	1,626.22
Fees for exemplification and copies of papers necessarily obtained for use in case	3,413.95
Docket fees under 28 U. S. C. 1923	65.00
Costs incident to taking of depositions	7,389.15
Cost as shown on Mandate of Court of Appeals	
Other Costs (Please itemize)	
Total	$ 12,877.20

~~State of~~ Washington
~~County of~~ District of Columbia } ss:

I, J.E. McNeil, do hereby affirm ~~do hereby swear~~ that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necassarily performed. A copy hereof was this day mailed to Laura Bonn, 14th & E, N.W. & Daid White, Department of Justice, W.D.C. with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk who will tax said costs on January 8, 1981 at 3 p.m.

J. E. McNeil

Attorney for Plaintiffs

Subscribed ~~and sworn~~ to and affirmed before me this 7th day of January A. D. 1982 at Washington, D.C.

Peter L. Holley
Notary Public. 1325 K. St. N.W. Wash DC
com exp. 3/15/83

Costs are hereby taxed in the amount of $ this day of , 19 , and that amount included in the judgment.

Clerk.

By
Deputy Clerk.

NOTE: SEE REVERSE SIDE FOR AUTHORITIES ON TAXING COSTS.

Witness [redacted] (computation, cf. 28 U. S. C. 182[redacted] statutory fees)

Name and Residence	Attendance Days	Attendance Total Cost	Subsistence Days	Subsistence Total Cost	Mileage Miles	Mileage Total Cost	Total Cost Each Witness
See attached schedule							
					TOTAL		

NOTICE

Section 1924, Title 28, U. S. Code (effective September 1, 1948) provides:

"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28 which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

Rule 54 (d)

"Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court."

Rule 6 (e)

"Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period."

Rule 58 (In Part)

"Entry of the judgment shall not be delayed for the taxing of costs."

Fees for Witnesses

Hobson v. Wilson 76-1326

Name and Residence	Attendance Days	Attendance Total Cost	Mileage Miles	Mileage Total Cost	Total Cost Each Witness
Jack Acree Metropolitan Police Department 300 Indiana Ave., NW Washington, DC 20001	1	$30.00			$30.00
Charles Brennan 487 N. Owen St. Alexandria, VA 22304	1	$30.00			$30.00
Melvin Winkelman MPD, Second District 3320 Idaho Ave., NW Washington, DC 20016	1	$30.00			$30.00
Harry G. Ervin 1107 Tiffany Rd. Silver Spring, MD 20904	1	$30.00			$30.00
George R. Suter MPD Adm. Duty Branch 300 Indiana Ave., NW Washington, DC 20001	1	$30.00			$30.00
Edward J. Jagen Mertopolitan Police Department 300 Indiana Ave., NE Washington, DC 20001	1	$30.00			$30.00
Harold Bynum Youth Services Branch Fourth District 6001 Georgia Ave., NW Washington, DC 20011	1	$30.00			$30.00
Blanco Drummond 3609 Tyrol Drive Landover, MD 20785	2	$60.00			$60.00
Gerald Grimaldi 1218 Kensington Rd. McLean, VA 22101	1	$30.00			$30.00
George C. Moore 6715 N. 27th St. Arlington, VA 22213	1	$30.00			$30.00
Chief Jerry Wilson 4415 Springdale St., NW Washington, DC 20016	1	$30.00			$30.00
Cortland Jones 6607 N. 29th St. Arlington, VA 22213					

Name and Residence	Attendance Days	Attendance Total Cost	Mileage Miles	Mileage Total Cost	Total Cost Each Witness
Philip E. Mostrom Records Management Division FBI Headquarters Washington, DC 20535	1	$30.00			$30.00
Don Gurewitz Boston, MA	1	$30.00		$90.00	$90.00
Carole Collum Los Angeles, CA	1			$300.00	$300.00
Dr. Sidney Peck Cambridge, MA	1			$216.00	$216.00

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM BY FEDERAL DEFENDANTS IN OPPOSITION TO MOTION BY WASHINGTON AREA WOMEN STRIKE FOR PEACE FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Following trial of this action, the jury returned a verdict in favor of the defendants with respect to the claims of plaintiff Washington Area Women Strike for Peace. The appropriate judgment was entered on December 23, 1981. This plaintiff has now moved for judgment notwithstanding the verdict.

The federal defendants oppose this motion on grounds that plaintiff Washington Area Women Strike for Peace has not satisfied the procedural requirements entitling it to file the instant motion, and the plaintiff presented insufficient evidence to justify setting aside the verdict.

I. Plaintiff Did Not Properly Move For Directed Verdict Prior To Submission Of The Case To The Jury

To move for judgment notwithstanding the verdict, a party must first have moved for directed verdict at the close of the evidence offered by the opponent. Rule 50, Federal Rules of Civil Procedure, states, "A motion for a directed verdict shall state the specific grounds therefor."

At the close of the evidence offered by defendants at trial plaintiffs' counsel moved for a directed verdict; however, no specific grounds for the motion were stated. Consequently, plaintiff Washington Area Women Strike For Peace is not entitled, under Rule 50, to move to set aside the verdict and have judgment entered in its favor. See 5A Moore's Federal Practice, ¶50.08.

II. Plaintiff Offered Insufficient Evidence To Justify Setting Aside The Verdict

The jury found that no defendant caused injury to plaintiff Washington Area Women Strike for Peace by either individual action or by action pursuant to conspiracy. Having so found, the jury did not address the issues of qualified immunity and the statute of limitations.

Two witnesses, Barbara Bick and Dagmar Wilson, testified in behalf of this plaintiff. Neither witness testified that the plaintiff organization suffered injury. Moreover, the evidence regarding the activities of the organization was such that the jury could have properly inferred that the Washington Area Women Strike for Peace was not injured by the conduct that was apparently found to have injured the other plaintiffs.

During trial of this action this plaintiff did not offer evidence so strongly weighted in its favor that a reasonable person could not have come to a conclusion in favor of the defendants. The instant motion alludes to no such evidence. The verdict as to this plaintiff was proper and should not be set aside.

CONCLUSION

For the foregoing reasons, the motion by plaintiff Washington Area Women Strike for Peace for judgment notwithstanding the verdict should be denied.

Respectfully submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F.C. RUFF
United States Attorney

BROOK HEDGE

DAVID H. WHITE

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Attorneys for defendants
Brennan, Grimaldi, Moore,
Jones, and Pangburn

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter having come before the Court on motion by plaintiff Washington Area Women Strike For Peace for judgment notwithstanding the verdict, and the Court being fully advised in the premises, it is this _____ day of _____, 1982,

ORDERED that the motion be, and hereby is, denied.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 18th day of January, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Opposition By Federal Defendants To Motion For Judgment Notwithstanding The Verdict Concerning Plaintiff Washington Area Women Strike For Peace, and proposed Order.

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Laura Bonn, Esquire
Assistant Corporation Counsel
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Washington, D.C. 20004

Daniel Schember, Esquire
Gaffney, Anspach, Schember,
Klimaski & Marks, P.C.
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Washington, D.C. 20036

DAVID H. WHITE
Attorney, Department of Justice
Washington, D.C. 20530

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MOTION BY DEFENDANTS BRENNAN, MOORE, JONES, PANGBURN, AND GRIMALDI FOR STAY OF EXECUTION OF JUDGMENT

Defendants Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould W. Pangburn, and Gerald T. Grimaldi, through undersigned counsel and pursuant to Rule 62(b) of the Federal Rules of Civil Procedure, move this Honorable Court for stay of execution of, or stay of any proceedings to enforce, the judgment entered in favor of plaintiffs on December 23, 1981, pending disposition of defendants' motion for judgment notwithstanding the verdict or, in the alternative, for new trial.

In support of this motion the defendants rely upon the attached memorandum of points and authorities.

Respectfully, submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F.C. RUFF
United States Attorney

Brook Hedge
BROOK HEDGE

David H. White
DAVID H. WHITE

Attorneys, Department of
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Tel: (202) 633-4269

Attorneys for federal
defendants.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANTS BRENNAN, MOORE, JONES, PANGBURN, AND GRIMALDI FOR STAY OF EXECUTION OF JUDGMENT

Following trial of this action, the jury returned a verdict in favor of plaintiffs and against the federal defendants in an amount totaling $262,500. Judgment was entered on December 23, 1981.

On January 4, 1982, the federal defendants moved pursuant to Rule 50(b), Federal Rules of Civil Procedure for judgment notwithstanding the verdict or, in the alternative, for a new trial. Having so moved, the federal defendants request that the Court stay execution of, and stay any proceedings to enforce, the judgment in this action pending disposition of the pending motions.

The federal defendants also request that the Court not require a bond at this time. In support of this request defendants state that defendants Brennan, Jones, Moore, and Grimaldi are retired from the Federal Bureau of Investigation and reside and own property in Virginia. Defendant Pangburn is currently the Assistant Special Agent in Charge of the counterintelligence division of the FBI's New York Office and resides in New Jersey. Thus, all defendants are stable and reputable men. In addition, as shown in the motion to set aside the judgment, the verdict is grossly excessive and to require a bond based on that verdict would be inappropriate. Moreover, the verdicts are so large that even a 10% bond would require a substantial, and possibly personally disruptive, outlay of

resources. Until such time as the pending motions are decided, which may well result in a substantial reduction if not a complete setting aside of the verdict, the Court should exercise its discretionary authority to grant a stay without requiring a bond. See Federal Prescription Service, Inc. v. American Pharmaceutical Association, 636 F.2d 755 (D.C. Cir. 1980).[1/]

CONCLUSION

For the foregoing reasons, federal defendants' motion for a stay should be granted.

Respectfully, submitted,

J. PAUL McGRATH
Assistant Attorney General

CHARLES F.C. RUFF
United States Attorney

Brook Hedge
BROOK HEDGE

Dan H. White
DAVID H. WHITE

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Attorneys for federal
defendants.

1/ Legislation is pending before Congress, S. 1775 and H.R. 24, which would amend the Federal Tort Claim Act to permit the United States to intervene in cases such as this. If this legislation is enacted, the United States would intervene as a party defendant and no bond would be required.

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

ORDER

This cause having come before the Court on motion by defendants Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould W. Pangburn, and Gerald T. Grimaldi for stay of execution of, or stay of proceedings to enforce, the judgment entered in favor of plaintiffs on December 23, 1981, and the Court being fully advised in the premises, it is this ____ day of January, 1982,

ORDERED that the motion be granted and that execution of, or any proceedings to enforce, said judgment be, and hereby is, stayed until disposition of the aforesaid defendants' motion for judgment notwithstanding the verdict or, in the alternative, for new trial.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 4th day of January, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Motions By Defendants Brennan, Moore, Jones, Pangburn, and Grimaldi For Stay Of Execution of Judgment, accompanying memorandum of points and authorities, and proposed ORDER.

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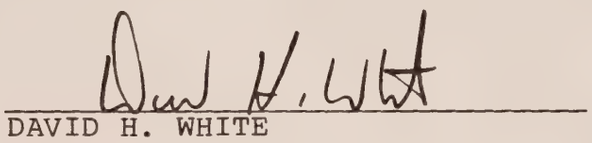

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Washington, D.C. 20530

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,
Plaintiffs,

v

JERRY V. WILSON, et al.,
Defendants.

Civil Action No. 76-1326

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO FEDERAL DEFENDANTS' MOTION FOR JUDGMENT NOT WITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

The F.B.I. defendants Brennan, Moore, Jones, Pangburn and Grimaldi have moved for judgment notwithstanding the verdict, or in the alternative, for a new trial. The reasons advanced for their motion for judgment n.o.v. go, with one exception, to the sufficiency of the evidence. Among the seven reasons advanced for a new trial, four are matters that were raised and ruled on during the trial and three are new issues.

I

THE EVIDENCE PRESENTED BY BOTH SIDES WAS CLEARLY NOT SO ONE-SIDED THAT NO REASONABLE JURY COULD FIND FOR PLAINTIFFS AND INDEED THE GREAT WEIGHT OF THE EVIDENCE FAVORED THE PLAINTIFFS

A motion for judgment notwithstanding the verdict "should not be granted unless the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." Vanderzee v Karabatos, 589 F.2d 723 (D.C.Cir.1978). Where there is substantial conflicting evidence, judgment n.o.v. is an improper usurpation of the jury's function. Id.,728.

The F.B.I. defendants' recitation of the evidence given in their motion refers almost exclusively to the plaintiffs' direct testimony and ignores the reasonable inferences which the jury could and surely did draw from the direct testimony and documents presented as exhibits as well as from the

testimony of adverse witnesses. The defendants argue that there was virtually no evidence on the statute of limitations issue or of a civil conspiracy to violate First Amendment rights. While not a complete list, the following is some of the evidence presented on each of these two issues from which the jury could easily infer the plaintiffs had met their burden of proof.

1. Statute of limitations (concealment by defendants and due diligence by plaintiffs): a.) secret nature of COINTELPRO-NEW LEFT and BLACK NATIONALIST PROGRAMS, testified to by defendants themselves and established in F.B.I. documents admitted into evidence which caution against discovery of COINTELPRO efforts or "embarrassment to the Bureau."; b.) extensive use of undercover informants, "pretext" interviews and telephone calls to gather information on plaintiffs all establish the F.B.I. defendants' active efforts at deliberate concealment; c.) fact that plaintiffs who did request their files under the Freedom of Information Act received substantially less material than actually existed (Bloom testimony); and d,) fact that even when given their domestic intelligence investigation files, plaintiffs were still unaware of COINTELPRO operations because these projects were not cross-filed in the file of the person who was the target (Jones and Mostrom testimony).

In light of this and other evidence adduced at trial, it is hardly unreasonable for the jury to have concluded the plaintiffs could not have found out the essential fact that there was more going on than "mere surveillance" any sooner than they did. Cf. Laird v Tatum, 408 U.S.1(1972).

2. Conspiracy to violate First Amendment: a.) F.B.I. documents, plaintiffs' exhibits #1 - 3, and #5 - 44 establish an agency-wide program to prevent certain designated groups and individuals from engaging in political protest; b) each defendant testified that he had the discretion to review and/or propose and/or disapprove COINTELPRO projects; c.) although every

defendant claimed someone else was responsible for the creation of the idea of COINTELPRO, none claimed ignorance of its goals; d.) each of the defendants was an employee of the F.B.I. for some or all of period sued for and participated in implementing COINTELPRO-NEW LEFT and/or COINTELPRO-BLACK NATIONALIST; e.) F.B.I. agents worked closely with D.C. police intelligence division personnel, exchanging photographs after demonstrations and other information about persons of interest to both agencies (Scrapper testimony); f.) the F.B.I. and D.C. police used similar methods for gathering information such as informers and electronic surveillance; and g.) the F.B.I. was given a strong box stolen by D.C. police personnel from a peace group's offices at 1029 Vermont Ave. N.W. (Marcum and Zelloe testimony) and Lt. Suter, a high ranking D.C. police intelligence division officer testified to awareness of the F.B.I.'s "little tricks." In addition, the jury had the opportunity to observe the demeanor and credibility of the witnesses, many of whom had memory lapses that the jury could reasonably have found prejudicial to that witnesses' credibility.

The F.B.I. defendants' legal argument, raised here for the first time, that there can be no conspiracy within a single agency is not supported by the cases they cite. In brief, most of the cases cited involve a single act carried out by several employees of a corporation rather than, as here, a wide-ranging program designed to "disrupt, neutralize, discredit" whole groups and individuals over a period of years. The defendants' argument that as mere employees carrying out instructions they cannot be liable for a conspiracy flies in the face of their insistence on qualified good faith immunity which is available to them only if they are government officials with some range of discretion. Scheuer v Rhodes, 416 U.S. 232(1974) and Barr v Mateo, 360 U.S. 564, 573(1959). It is also inconsistent with their argument that the single entity, the F.B.I., was not on trial. The rather arcane "single entity" conspiracy issue therefore does not even apply in this case. See, too, Novotny v Great American Federal Savings & Loan Assoc., 584 F.2d 1235 (3rd. Cir.1978) questioning the merits of the "single entity" holding that a business corporation cannot conspire through its members.

Not only did the evidence prove the defendants (with the exception of Pangburn) had broad discretion and responsibilities for implementing COINTELPRO, but it was clear that these defendants had direct supervisory (or in the case of Pangburn actual contact) responsibility over the agents charged with the plaintiffs' investigations and approved the COINTELPRO efforts of which plaintiffs became the targets.

DEFENDANT COURTLAND JONES IS NOT ENTITLED TO JUDGMENT N.O.V. SINCE THE ISSUE OF LATE SERVICE ON HIM HAS ALREADY BEEN RULED UPON AND TRIAL HAS FAILED TO SHOW ANY PREJUDICE

Defendant Jones moved pre-trial for dismissal or continuance on the grounds of failure to prosecute because the plaintiffs had not been able to serve him until June 21, 1981. But as he testified at trial, he had been aware of this lawsuit much earlier and indeed had been served in December, 1978 but he successfully moved to quash that service as insufficient.

The defense raised by Jones at trial differed in no discernible respect from the defense raised by the other defendants and since no special prejudice to him has been shown or argued as a result of the delay there is no basis for the Court to reverse its earlier ruling denying Jones' motion to dismiss for failure to prosecute.

II

DEFENDANTS' ALTERNATIVE MOTION FOR A NEW TRIAL MUST ALSO FAIL IN THAT THE TRIAL CONTAINED VIRTUALLY NO ERROR OF WHICH THE DEFENDANTS CAN COMPLAIN NOR WAS THE VERDICT EXCESSIVE OR AGAINST THE WEIGHT OF THE EVIDENCE

Although the Court has wide discretion to grant or deny a motion for a new trial under Federal Rule Civ. P.59, this power is directed toward preventing a miscarriage of justice and should not be used absent a showing of legal error and substantial prejudice. See generally 6A Moore's Fed. Prac. ¶59.08. None of the seven grounds advanced by defendants and discussed

below warrant a new trial.

MISCONDUCT OF THE JURY OR COUNSEL WARRANTS A NEW TRIAL ONLY IF THERE IS A DEMONSTRATION OF PREJUDICE. THERE WAS NEITHER MISCONDUCT NOR PREJUDICE IN THIS CASE WHEN PLAINTIFFS' COUNSEL HAD A FORMER JUROR INTERVIEWED

The defendants' attempt to win a new trial because of plaintiffs' alleged "misconduct" in contacting a former juror is seriously wide of the mark. While plaintiffs do not dispute that a brief conversation was had with Mrs. Sidransky, a former juror who had been excused from the jury a week and a half earlier, the conversation violated no rule or order of the Court and was conducted with the utmost care to make sure there was no possibility of taint to the actual jury of which Mrs. Sidransky was no longer a part.

As the Court's careful on-the-record voire dire of both Mrs. Sidransky and the attorney who contacted her showed, the conversation lasted only a few minutes. The juror was asked for her general impressions of the case which she gave; she was told not to discuss the case or the conversation with any of the jurors and she said she certainly had no intention of doing so. She indicated that the jurors had not discussed the case among themselves up to the point she left the jury (which was December 3, 1981) and thus Mrs. Sidransky's impressions of the case were just that - - her own. (See Transcript of Mrs. Sidransky, Conference in Chambers, Dec. 18, 1981).

Defendants contend that this conversation with Mrs. Sidransky violated a specific order of the Court but there is no basis for this very serious charge because there was no such order. Similarly, Local District Court Rule 1-28 prohibiting communication with jurors does not govern. That Rule states as follows:

COMMUNICATIONS WITH JURORS

(a) COMMUNICATIONS DURING TRIAL
No attorney for a party shall converse with a member of the jury during the trial of a case.

(b) COMMUNICATIONS AFTER VERDICT AND PRIOR TO DISCHARGE
After a verdict is rendered but before the jury is discharged

> from the case, counsel may request leave of the court to converse with members of the jury. Upon receiving such a request, the court will inform the juror that no juror has any obligation to speak with counsel but may do so if he wishes.
>
> (c) COMMUNICATIONS AFTER DISCHARGE
> After the jury is discharged, no attorney for a party shall converse with a member of the jury concerning the case except by leave of court for good cause shown in writing. If the Court is satisfied that good cause exists, it will set the matter for hearing at which time counsel may propound his questions to the juror.

Both the letter and the spirit of Local Rule 1-28 are clear: to prohibit contact by counsel with a sitting jury and then to prevent efforts by counsel after a verdict has been reached to impeach the verdict through information gained from jurors. The Rule by its plain language does not apply to persons who at one time sat on a jury but did not continue through to verdict and did not engage in the intimate discussions that are jury deliberations nor is there any reason in law or logic to read the Rule to so apply. So long as the conversation with the former juror does not get back to the jury, and is not intended for that purpose, there is no impropriety and certainly no violation of Local Rule 1-28.[1/]

Defendants cite no cases in support of their position that the Sidransky conversation was improper and plaintiffs' research also has revealed no cases discussing conversations with <u>former</u> jurors who left the jury before verdict. The cases involving contact with sitting jurors, or with jurors after verdict, - - both more serious than the situation here - - show that verdicts will not be set aside and new trials granted unless there is some demonstrable prejudice. The leading case is the U.S. Supreme Court's recent decision in <u>Smith</u> v <u>Phillips</u>, ____U.S.____, 50L.W.4190 (dec'd Jan. 25, 1982) in which the court held that there should not have been a new trial ordered for Smith, a convicted murderer, even though the D.A. prosecuting the case had learned during the trial that one of the jurors was applying for a job as a major felony investigator with the D.A.'s office and failed to inform

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1/ Defendant make a point of the fact that attorney Mary Pike who spoke to Mrs. Sidransky had entered her appearance for the plaintiffs; actually she did not do so until the conference on jury instructions held Dec. 15, 1981 and thus was not counsel of record for plaintiffs at the time of the conversation.

the Court or defense counsel of this fact. The Court even went so far as to note that "in cases of egregious prosecutorial misconduct, such as the knowing use of perjured testimony, we have required a new trial only when the tainted evidence was material to the case." Id.n.10. Even before Smith, courts have consistently reversed grants of new trials for contact with the jury unless grave prejudice is shown. See Ryan v U.S., 191 F.2d 779 (D.C.Cir.1951), cert. den. sub nom. Duncan v U.S., 342 F.2d 928 (1952); Jordan v U.S., 408 F.2d 1305 (D.C.Cir.1969), (a juror and a defense witness met during a lunch recess and the juror loaned the witness money for lunch); and Turner v U.S., 416 F.2d 815 (D.C.Cir.1969), (defense counsel spoke to a juror about the trial after the verdict had been rendered against his client and learned that one of the women jurors had said during trial that she had read something about the defendant in the newspaper and that he "was a bad one.") It should be pointed out that the prejudice of which all the jury contact cases speak is prejudice affecting or thought to affect a juror's fairmindedness in deliberation. The prejudice the defendants have conjured up for their motion for a new trial is an entirely different sort. They argue that the plaintiffs' brief conversation with Mrs. Sidransky gave their counsel an unfair advantage because it gave "invaluable insight into the mind and attitude of this juror and by implication into the minds of other jurors." (Memorandum in Support of Motion at 18). This sort of highly speculative theory can hardly support a new trial.

The complained of conversation did not take place until December 14, 1981 at 4:50 p.m. after all parties had rested finally (but before closing argument) and therefore the "invaluable insights" could not have had any impact on the plaintiffs' presentation of evidence. As far as closing argument is concerned, the knowledge that at least one former juror had a general idea what the case was about was certainly reassuring to counsel but can hardly be considered an invaluable insight. Furthermore, since Mrs. Sidransky had only sat through slightly more than half of the plaintiffs' case-in-chief and none of the defense, her views were of limited value at

best. Similarly the fact that she had been the sole white juror makes it unlikely that her perceptions would be the same as those of the remaining all black jurors in a case where one's life experiences can be expected to play a large part in responses to evidence. And finally, Mrs. Sidransky was of course as available to defense counsel to question as she was to plaintiffs.

PLAINTIFFS' F.B.I. FILES WERE PROPERLY ADMITTED INTO EVIDENCE

The defendants' objection to admission of portions of the files kept by the F.B.I. on the plaintiffs was made and denied during trial. It is incorrect that there was no connection between the defendants and these files. For one thing defendant Pangburn's name appears as the Agent receiving some informers' reports on David Eaton and Reginald Booker. But more significantly, as the Church Committee report noted, domestic intelligence files were used to help select targets for COINTELPRO efforts. Courtland Jones was domestic intelligence and COINTELPRO coordinator for the Washington Field Office of the F.B.I. and thus the files were gathered under his aegis. Charles Brennan was from 1966 through 1971 in the national headquarters of the F.B.I. where he had responsibility for non-criminal domestic political intelligence gathering. So, too, with defendant George Moore who had general responsibility for intelligence gathering of black citizens and groups. Gerald Grimaldi, the author of the Rational Observer, was squad leader in the Washington Field Office and in charge of COINTELPRO-NEW LEFT. Since the jury could reasonably infer that the raw intelligence files provided agents like Grimaldi with the data they needed to fashion COINTELPRO proposals, the admission of the files clearly was not improper regardless of who actually compiled them.

In addition, the files were necessary, to show the extent of defendants' interest in plaintiffs' activities and that this interest was not limited to preventing violence or combatting Communist influence. The files were also

necessary in light of the defendants unanimous failure to recall F.B.I. efforts aimed at individual plaintiffs. Without the files it would have been possible for the defendants to claim that neither the F.B.I. nor themselves had ever had any interest in the plaintiffs.

THE JURY INSTRUCTIONS ON CONSPIRACY AND THE STATUTE OF LIMITATIONS DEFENSE WERE NOT ERRONEOUS

The gist of a cause of action for conspiracy under 42 U.S.C. §1985(3) is explained in Griffin v Breckenridge, 403 U.S. 88, 102-3 (1971) and was followed by the Court in its conspiracy instructions. The defendants' objection, that some specific intent on the part of each conspirator had to be found, goes beyond Griffin and confuses civil conspiracy with criminal liability. The Court's definition of an overt act as any act in furtherance of the conspiracy is also taken directly from Griffin v Breckenridge, id. at 102-3.

The Court's instruction on the elements of the Statute of Limitations defense followed the analysis contained in Richards v Mileski, 662F.2d 65, (D.C.Cir.1981). The evidence did not warrant the defendants' request for an instruction that "mere silence" is not deliberate concealment since the evidence conclusively established that COINTELPRO was a secret program which the F.B.I. took active steps to keep secret. (See p.2 supra). The Court's instruction that deliberate concealment even if for law enforcement purposes could toll the Statute was correct especially since the jury was also told that the concealment had to be by the defendants or a conspiracy to which they belonged.

THE DEFENDANTS WERE NOT ENTITLED TO AN INSTRUCTION ON THE FACT THAT THE UNITED STATES WOULD NOT ASSUME PAYMENT OF ANY VERDICTS

The defendants were free to put on evidence of their own financial position and to try to prove the "fact", if it is one, that the federal

governement will not assume payment of any damages awarded against federal employees. The Court was correct in refusing to instruct the jury to the contrary especially in the absence of any evidence to support such an instruction.

THERE WAS NO ERROR IN THE FORM OF THE SPECIAL VERDICT FORMS GIVEN THE JURY

The defendants requested that the first page of the four part special verdict form contain the questions on Statute of Limitations. The Court in its discretion put both affirmative defenses (immunity and Statute of Limitations) after the issue of whether any actionable injury had occurred. This was hardly illogical and given the length and complexity of the case it would have been confusing for the jury to have started at any other point.

The jury apparently was able to make an independent determination on the limitations question since it did rule in favor of two defendants (albeit not F.B.I.) on that issue.

THE VERDICT WAS NOT CONTRARY TO THE WEIGHT OF THE EVIDENCE

The verdicts against the F.B.I. defendants vary according to the degree of responsibility each defendant had. The evidence indicated little difference between Grimaldi and Pangburn's duties and an equal award against each of them is not clearly erroneous. The injuries to the plaintiffs were intangible and it is entirely reasonable to have awarded each plaintiff similar amounts. The evidence did not suggest one plaintiff had been harmed more than another. The plaintiffs were all involved in exercise of First Amendment rights over an extended period and in organizing others to join with them. The defendants' COINTELPRO efforts were aimed not so much at individuals as at the peace movement as a whole, or at disrupting particular demonstrations, or at black community groups. To the extent these counterintelligence efforts hit their mark, the effect was felt equally by the plaintiffs who were all political activists engaged in

the peace movement and/or local community issues. Because of the close identity of goals among the plaintiffs, an injury to one truly was an injury to all.

New trials because the verdict appears contrary to the weight of the evidence are not favored since they intrude on the plaintiff's right to a jury trial. Lind v Schenley Industries, 278 F.2d 79(2ndCir.1960); Taylor v Washington Terminal Co.,409 F.2d 145(D.C.Cir.1969).

THE AWARDS OF DAMAGES ARE NOT IN LIGHT OF ALL THE EVIDENCE CLEARLY EXCESSIVE

The evidence presented in the course of this four week trial showed that the F.B.I. defendants participated in a deliberate effort to damage the reputations, disrupt the activities, and "otherwise neutralize" the plaintiffs and those like them who were engaged in political activity and associations of which the F.B.I. disapproved. There was no claim that the plaintiffs were engaged in criminal, terrorist, or even violent activity. Yet they were subject to extensive, intrusive surveillance for several years and victimized by F.B.I. COINTELPRO efforts the most notable of which were those designed to cause racial hatred and distrust between the peace groups (especially the New Mobilization Committee) and the local black community in the District of Columbia, an effort that the jury could easily have concluded was successful. In addition, under the auspices of COINTELPRO, efforts were made to misdirect marchers at peaceful demonstrations and to counterfeit volunteer housing forms so as to inconvenience visitors and discredit the plaintiffs who had organized the demonstration. By the F.B.I.'s own analysis, these efforts were successful. (See plaintiffs' exhibits #15,16).

The events complained of in this case did not occur on a single day or at a single spot as in the Capitol steps arrests in Dellums v Powell, 566 F.2d 167(D.C.Cir.1977) but went on for several years, until 1971 when the F.B.I. stopped the program because it feared discovery. During this

time, the plaintiffs were trailed, their friends, neighbors and employees interviewed and their meetings attended by people posing as concerned citizens but in fact working for the F.B.I. or the D.C. police department.

The defendants' reliance on Dellums is inapposite. Dellums was a class action. When the jury in that case awarded $7,500.00 for a single one-time partial deprivation of First Amendment rights, it also awarded money for false arrest and false imprisonment, Eighth Amendment violations, and malicious prosecution, Constitutional and common law claims which arose out of the same incident. Dellums, id. at 174, n.6. There was some question that these awards duplicated each other. In addition, the Court was concerned that the award was going to a class of approximately two thousand and thus any error would be compounded; that the instructions had contained no admonition that the award reflect the severity of the loss; and that the award of $7,500.00 may have improperly included primative damages (not before the jury) and damages for emotional distress. Id. at 209-210 (J. Leventhal, concurring opinion).

In the instant case, the jury was clearly instructed to take into account the degree of loss actually suffered and the extent to which First Amendment rights were thwarted. In addition, both emotional distress and punative damages were properly before the jury; punative damages were awarded separately from compensatory damages and thus the concern in Dellums is absent here.[2/]

Given the importance of the rights interferred with, the duration of the program and the methods employed (false letters, misdirection of marchers, fictitious press releases, intimidating interviews, counterfeit documents), it is clear that the damages awarded are not excessive. Cf. Carey v Piphus,

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2/ It is interesting to note that even after the District Court reduced the Dellums plaintiffs' awards for First Amendments violations to $750.00 each, the total liability still exceeded the total jury verdict here. Dellums, 660 F.2d 804, n.2.

Conclusion

For the foregoing reasons, the federal defendants' motion for judgment notwithstanding the verdict or, alternatively, a new trial should both be denied.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have mailed a copy of the foregoing Plaintiffs' Memorandum of Points and Authorities in Opposition to Federal Defendants' Motion for Judgment not Withstanding the Verdict or, In The Alternative, For a New Trial to Laura Bonn and David White this 9th day of February, 1982.

Anne Pilsbury

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs	
v	Civil Action No. 76-1326
JERRY V. WILSON, et al., Defendants	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DISTRICT OF COLUMBIA DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, ALTERNATIVELY, FOR A NEW TRIAL OR REMITTITUR

The District of Columbia defendants have moved for judgment notwithstanding the verdict, or a new trial, or a remittitur. Their basis for seeking judgment n.o.v. or a new trial are basically the same: a claim that the evidence was insufficient for the jury to find as it did; that there were legal errors in the instructions; and that the verdicts are inconsistent. In addition, they seek a new trial on the grounds that plaintiffs' counsel communicated with an excused juror. Alternatively, the District defendants seek a remittitur although they do not indicate of which verdicts or in what amounts and advance no independent grounds for the remittitur.

I

THE EVIDENCE PRESENTED CLEARLY ENTITLED THE JURY TO FIND AGAINST ALL THE DISTRICT OF COLUMBIA DEFENDANTS AND TO REJECT THE DEFENSES RAISED ON LIMITATION OF ACTIONS AND QUALIFIED IMMUNITY

The standard for granting judgment n.o.v. is set forth in Vanderzee v Karabatos, 589 F.2d 723(D.C.Cir.1978). The evidence must be so one-sided in favor of the movant that reasonable men could not disagree. The evidence must be viewed in the light most favorable to the party for whom the verdict was rendered. Berkey Photo, Inc. v Eastman Kodak Co., 603 F.2d 263, 304

(2nd Cir.1979). So too new trials on the grounds that the verdict was contrary to the weight of the evidence are closely scrutinized on appeal because in such a case "the judge takes over, if he does not usurp, the prime function of the jury as the trier of the facts." Vanderzee, id.728-9. Neither judgment n.o.v. or a new trial is appropriate where, as here, there was substantial conflicting evidence. Id.

The evidence in this case from which the jury could reasonably have found against the District defendants include the following: a.) Cullinane report, Wilson and Scrapper testimony that files were kept on virtually all "demonstrator groups;" Spiker's statement, plaintiff's exhibit #90: "You name it, most any group that was [in] the city at that time certainly we had an interest in them"; b.) the fact the District intelligence division, headed by defendants Herlihy and Chief Wilson, placed undercover informers in groups in which plaintiffs Bloom Washow, Pollock, Abbott, Booker and Eaton had leadership or major roles and also had informers in the Washington Peace Center (Okeson statement, plaintiffs' exhibit #91); c.) files were maintained on individuals including Julius and Tina Hobson but there were no guidelines on what went in these files (Cullinane report and Scrapper testimony); d.) demonstrations were disrupted or made more violent by acts of D.C. police agents (Abbott, Hobson and Pollock testimony); e.) mailing lists, names of contributors, "everything we could get our hands on" were taken from offices at 1029 Vermont Avenue and the Washington Peace Center and turned into the Intelligence Division (Marcum and Okeson statements, exhibits #88 and #91); f.) a xerox machine shared by all the peace groups at 1029 Vermont Avenue was smashed by a D.C. police source right before a major demonstration (Spiker statement, testimony of Sidney Peck); g.) contacts with F.B.I. at field level; sharing of photographs, pilfered materials, information , and wiretap transcripts with the F.B.I.;(Scrapper, Zelloe, Suter testimony); h.) destruction of all files ordered by Wilson in 1974 around the same time the public was first becoming aware of F.B.I. COINTELPRO; i.) availability of $150,000.00 to D.C. Intelligence Division in 1968 which was used almost

exclusively to hire informers and to pay sources in non-criminal political intelligence gathering 1968 - 1974 (Cullinane report, Wilson and Herlihy testimony); j.) testimony of Helen Gurewitz, Don Gurewitz, Abe Bloom and Sid Peck on suspected informer Steve Wilcox's role in disrupting telephone service to New Mobe offices; and k.) fact that D.C. Intelligence had "unknown agents" in New Mobe and other peace group offices. (Marcum, Spiker, Okeson statements).

While is it true that the case against the District defendants relies more heavily on circumstantial evidence than does the case against the F.B.I. defendants, this is largely because the District destroyed its own files and apparently had very little in the way of written, or even oral, guidelines for its Intelligence Division employees. But the jury was not limited to the plaintiffs' direct testimony in deciding this case; it could and did draw logical inferences from the scraps of evidence presented which showed a pattern of behavior in which the District defendants infiltrated plaintiffs' organizations, wiretapped or bugged offices and premises where the plaintiffs were apt to be, and set undercover informers loose to work with reckless abandon. While the case against the District defendants lacks documents such as plaintiffs' exhibits #1-3 which set forth in so many ~~works~~ words the F.B.I.'s intention to curtail the activities of the "New Left" and "Black Nationalist" groups, the tone and content of the Marcum, Spiker, and Okeson statements make clear that the D.C. Intelligence Division had earmarked the same groups and had an adversarial "anything goes" attitude toward these groups.

The jury was, of course, also free to assess the credibility and demeanor of the witnesses. In weighing the District defendants' claim that they knew nothing of the F.B.I.'s COINTELPRO efforts, the jury was entitled to take into account the frequent field contacts between the two offices (D.C. Intelligence Division and WFO), the rank of the defendants, the defendant's motive for denying knowledge of COINTELPRO, and the fact that at least some

Intelligence Division members did not hesitate to turn over a purloined strong box from 1029 Vermont Ave. to the F.B.I., allowing an inference that D.C. officials knew the F.B.I. would not look askance at a burglary of a peace organization's offices. See Hampton v Hanrahan, 600 F.2d 600,624(7thCir.1979

The District defendants' argument that plaintiffs failed to produce any evidence "to overcome" the qualified immunity enjoyed by the defendants suggests that the plaintiffs had the burden of proof on this issue which they clearly did not. Dennis v Sparks, ___U.S.___,101 S.Ct.183; 66L.Ed.2d 185(1980); Dellums v Powell, 660 F.2d 802,807 (D.C.Cir.1981). The jury could have simply discounted the defendants' claims of good faith, especially in light of the destruction of files, the failure to produce Marcum, Okeson or Spiker to testify at trial, and the indications that clearly illegal actions (e.g. 1029 Vermont Ave. burglary) were condoned if not ordered.

Furthermore, the defendants' insistence that they were involved only in preventing violence or getting advance knowledge of demonstrations was belied by the infiltration of the Black United Front which held no mass demonstrations and the infiltration of groups even the defendants knew to be peaceful such as WAPAC. In short, the jury did not accept the District defendants' contention that they were engaged only in the type of benign surveillance condoned in Laird v Tatum, 408 U.S.1(1972). Nor was it unreasonable to conclude that the exchange of information between the D.C. Intelligence Division and the Washington Field Office, especially between Gerald Grimaldi, who was in charge of COINTELPRO operations, and Sgt. Scrapper who covered New Left groups and individuals, was not the sort of "traditional exchange of information with other law enforcement agencies" allowed in Philadelphia Yearly Meeting v Tate, 519 F.2d 1335(3rdCir.1975).

On the question of the sufficiency of the evidence on the Statute of Limitations, three points suffice: 1) the D.C. intelligence division files were all intentionally destroyed in 1974, making inquiry after that date futile; 2) there was no public acknowledgment of D.C. Intelligence Division activities until the city council hearings and Cullinane Report in 1974;

3) much of the evidence relating to taking membership lists, contributors names, the 1029 Vermont burglary, and numerous electronic surveillances relating to groups in which plaintiffs were active was not disclosed in the Cullinane Report and came out only in the Winkleman investigation which, of course, was not publicly available. The "due diligence" standard set forth in Richards v Mileski, 662 F.2d 65 (D.C.Cir.1981) does not require the plaintiffs to make futile and ritualistic inquiries. The jury was entitled to take into account, in determining what constituted "due diligence", that the defendants were engaged in a clandestine undercover operation of intelligence gathering which it is reasonable to infer they would not have made public upon citizen inquiry.

II

THE DISTRICT OF COLUMBIA DEFENDANTS ARE AMENABLE TO SUIT FOR "PRIVATE" CONSPIRACIES UNDER 42 U.S.C. §1985(3) AND THE FACTS IN THIS CASE ESTABLISHED SUCH A CONSPIRACY

There is no "state action" required for a conspiracy to violate civil rights under 42 U.S.C. §1985 although certainly government officials can be held liable under this section if they participate in a conspiracy. Since §1985 looks to individual action rather than to proscribing governmental conduct, the issue of whether the District of Columbia is a "State or Territory" loses its significance. District of Columbia v Carter, 409 U.S. 418, 420-5(1973). In Hurd v Hodge, 334 U.S. 24(1948), §1982 was held applicable in the District despite the presence of the "State and Territory" language because §1982 like §1985 speaks to individual action. It would indeed be an anomaly if by entering the Nation's Capital an individual could escape liability for civil rights violations.[1/]

1/ Although the issue was not argued in Fitzgerald v Seamens, 553 F.2d 220, 226 (D.C.Cir.1977), the Court noted that a §1985 conspiracy was pled without expressing any reservation about its application in the District.

The jury could have found that the District defendants had targeted the same class of people as the F.B.I. defendants in an effort to interfer with or render ineffective the political activities of these groups and persons. Even under a narrow reading of Griffin v Breckinridge, 403 U.S. 88(1971), efforts aimed at interferring with black groups falls within its historical thrust. And efforts aimed at disrupting peace activists or the "New Left" are surely just as invidious and inimical to the enjoyment of equal privileges by American citizens. That the Griffin court failed to foresee the type of conspiracy presented in this case is not an indication that §1985 precludes it but is rather a function of the fact that such domestic counter-intelligence programs against American citizens have not been common in our history. For a recent case involving similar facts and issues in which the animus necessary for a §1985 conspiracy was found see Hampton v Hanrahan, 600 F.2d 600, 624.

III

THE LIABILITY OF THE DISTRICT OF COLUMBIA ITSELF FOR CONSTITUTIONAL TORTS OF ITS AGENTS IS CLEARLY ESTABLISHED AS A MATTER OF LAW AND ON THE BASIS OF EVIDENCE IN THIS CASE

The liability of the municipal corporation for torts committed by its agents acting in the scope of their employment is well established. Dellums v Powell, 566 F.2d 216,222-5 (D.C.Cir.1977); Spencer v General Hospital of the District of Columbia, 425 F.2d 479, 484 (D.C.Cir.1969). Monell v N.Y.C. Dept. of Social Services, 436 U.S. 658(1978) does not alter this rule; Monell expanded the reach of §1983 to include municipal corporations, overruling Monroe v Pape, 365 U.S. 167(1961).

The instant case was not brought under §1983 which at the time this suit was filed did not apply in the District of Columbia. District of Columbia v Carter, 409 U.S. 418(1973). Even if it had been brought under §1983, the connection between tortious acts and the municipality required by Monell - - that the acts "may fairly be said to represent official policy" - - is present in this case. Neither Chief Jerry Wilson nor Inspector Thomas Herlihy attempted to disavow the operations of the D.C. Intelligence Division as something outside of official policy. The evidence showed they knew of and directed the payment of funds to informers who reported on lawful political activities, authorized the use of fake TV crews to interview demonstrators, oversaw installation of wiretaps on political groups and maintained and then ordered the destruction of political intelligence files.

IV

PUNATIVE DAMAGES WERE PROPERLY AWARDED AGAINST WILSON AND HERLIHY

The jury awarded punative damages against Chief Wilson and Inspector Herlihy because they were the two defendants with overall responsibility for the MPD intelligence division. They allowed outrageous things to occur. It

is entirely reasonable for the jury to have concluded either that they knew about much of the conduct described in the Winkleman statements and either condoned it or encouraged it or, at best, that they consciously looked the other way. In either case, punative damages are appropriate. A total lack of guidelines for police agents who are working in a field as delicate as political surveillance constitutes reckless disregard of the rights of the persons being investigated.

V

THE VARIATIONS IN THE JURY'S VERDICTS ON ISSUES OF IMMUNITY AND STATUTE OF LIMITATIONS FOLLOW FROM THE JURY'S PERCEPTION OF THE EVIDENCE AND ARE NOT INCONSISTENT

The District defendants seek a new trial because the jury did not make the same findings on the special verdict forms for all plaintiffs and, according to defendants, found inconsistently. While identical findings as to each plaintiff would not have been unexpected in this case, the fact that the jury did not do so shows the care it took to apply the evidence. The variations in the special verdicts do not require the conclusion that the jury erroneously applied a rule of law and hence are not the basis for a new trial. Cf. Presidential Properties, Inc. v Canto, 615 F.2d 657(5thCir.1980)

The jury found that defendants Kolego and Bynum were immune. This of course does not mean the jury did not find they did not do the acts testified to but rather that these two defendants acted under a reasonable good faith belief that their acts were lawful. This was precisely the thrust of Anne Kolego's testimony: that she infiltrated P.C.P.J. (People's Coalition For Peace and Justice) and other anti-war groups and assumed an identity as "Crazie Annie" but she felt in doing so she was helping her superiors better understand the peaceful nature of plaintiff Pollock and others like him. The jury apparently believed this testimony and felt she should be immune. So,

too, with Harold Bynum, a soft-spoken low ranking black officer who told the jury he did not even know what E.C.T.C. (the organization he infiltrated) stood for and did not remember that now Mayor Marion Barry had been its vice-president. Bynum testified that he had no idea what went on back at Intelligence Division headquarters and this the jury could well have believed and thus found him immune. But the information Bynum and Kolego gathered and their role, albeit unwitting, in disruption of plaintiff activities is something for which Bynum and Kolego's supervisors were responsible. The District of Columbia as a municipal corporation can be held liable despite the good faith defense of its agents. Owen v City of Independence, Mo., 420 U.S. 308(1980).

The fact the jury found Bynum and Kolego's good faith defense compelling but did not find the other defendants had met their burden on this issue is a matter of the weight of the evidence. With the exception of Jagen and Mahaney, the other defendants were of higher rank and the evidence was clear that they did in fact know more about intelligence operations. Scrapper was, for example, Kolego's control agent. As for Jagen, who addressed the jury with some vigor about the "bombing of the Capitol" and testified that he "had been harrassed into joining" WAPAC (Washington Area Peace Action Coalition), it is possible that he lacked sufficient credibility. Mahaney also appeared to be more involved than Bynum or Kolego. He testified to investigating or covering P.C.P.J.,Arthur Waskow, and the New Mobe; to participation in electronic surveillance; and had supervisory responsibility over Anne Kolego for a brief time. Hence there is nothing inconsistent in the jury's finding Kolego and Bynum immune but not the other defendants.

There is also no inconsistency in the jury's conclusion that claims against Bynum were time barred but not claims against the other defendants. (The plaintiffs have moved for judgment notwithstanding the verdict on the issue of the timeliness of claims against Anne Kolego since the evidence was uncontradicted on this issue). The jury's

findings on Bynum indicates that they felt the plaintiffs knew in 1970 or 1971 that he was a police officer who had inflitrated E.C.T.C. (Emergency Committee on the Transportation Crisis) and B.U.F(Black United Front) and that any claims against him as an individual were, therefore, time barred. But from the evidence it was entirely possible for the jury to have found that the mere knowledge Bynums was a police officer did not put them on notice about other claims or other officers. The District of Columbia and high level MPD employees could still be charged with acts against E.C.T.C. and B.U.F. (eg. provocation at Three Sisters Bridge demonstration) for which Bynum was not responsible. Alternatively, the jury could have found that although a cause of action against Bynum was barred, claims for his actions as part of a MPD conspiracy were not barred as against the other defendants because knowledge of Bynum's employment did not inexorably lead to knowledge of a conspiracy to violate First Amendment rights.

VI

THERE WAS NO MULTIPLE RECOVERY FOR SAME CLAIM AWARDED ANY PLAINTIFF

The defendants argue that the amount awarded the plaintiffs was multiplied by a factor of 13. A review of the verdict form, page four, makes clear that the jury did exactly what the Court instructed it to: it determined an overall figure and then divided this sum by the number of defendants it found liable, proportioning it according to culpability. There is no evidence of double recovery.

VII

A HIGHER AWARD AGAINST DISTRICT OF COLUMBIA WAS PROPER GIVEN THE EVIDENCE OF ACTS BY UNKNOWN AGENTS

The complaint alleged and the evidence proved acts done by persons not named in the complaint as defendants. Because of the secrecy of undercover

intelligence operations and the destruction of files, it was not possible for the plaintiffs to know the identity of all the persons who participated in acts against them. There was testimony about acts done by officers Okeson, Spiker, Marcum, Zelloe and Drummond for which the District of Columbia was properly responsible and which could justify an award against the corporation itself.

VIII

THE FACT THAT THE DISTRICT DEFENDANTS TAKEN TOGETHER ARE LIABLE FOR A GREATER SHARE OF THE TOTAL DAMAGES THAN THE F.B.I. DEFENDANTS DOES NOT LEAD TO THE CONCLUSION THE VERDICTS WERE INCONSISTENT OR AGAINST THE WEIGHT OF THE EVIDENCE

The jury awarded one sum to each plaintiff and then allocated it as noted above. It did, in fact, charge the individual F.B.I. defendants with the highest amounts as the evidence suggested. Chief Jerry Wilson, the individual D.C. defendant with the highest liability, was directed to pay a sum equal to the lowest of those against F.B.I. defendants. The award against the municipal corporation is proper for the reasons noted in Part VII above. The fact the District defendants ended up with a greater total liability than the four F.B.I. defendants is a function, as the District points out, of the fact there were more District defendants. Since a conspiracy was alleged and proved, each defendant is liable for the total damages and there is no requirement that an individual conspirator be assessed only that amount which corresponds directly to his degree of involvement. If the District of Columbia defendants have been made to bear an unfair share of responsibility for actions that F.B.I. personnel is primarily responsible for, as they seem to suggest, then it is because they did not avail themselves of their right to cross-claim against the F.B.I. defendants or to join additional parties under Federal Rule Civ.P.13.

IX

THERE WAS NO IMPROPRIETY OR JURY PREJUDICE IN PLAINTIFFS' COUNSEL'S CONTACT WITH AN EXCUSED JUROR

As is outlined in greater detail in plaintiffs' memorandum of points and authorities in opposition to federal defendants' motion n.o.v. (pgs. 6-8 of which is hereby incorporated herein), the brief conversation with Mrs. Sidransky, after she had been excused from the jury, did not violate Local District Court Rule 1-28. The local rule prohibits contact with sitting jurors and with jurors after they have reached a verdict. It does not, and could not without raising serious First Amendment questions, prohibit contact with a person who had at one time been a juror but who did not continue through to verdict. The local rule is designed to assure the sanctity of the jury and its deliberations. The contact with an excused juror in this case did not taint in any respect the jury or its deliberations. There is no allegation that it did.

Even where misconduct by counsel is established, a new trial is not appropriate unless it is clearly shown that a juror was actually biased or influenced. Smith v Phillips, ____U.S.____,50 L.W. 4190(dec'd Jan. 25, 1982).

X

THE AMOUNTS AWARDED ARE NOT CLEARLY EXCESSIVE

The plaintiffs have addressed this issue at length in their memorandum of points and authorities in opposition to federal defendants' motion n.o.v. and would incorporate part IIG of that memorandum herein. Also, see Flores v Pierce, 617 F.2d 1386(9thCir.1980), (no new trial on ground of excessive damages where Mexican-American restaurant awarded $48,500.00 for a 10-month delay due to ethic discrimination in obtaining liquor license.)

One point raised in the District defendants' memorandum which is not raised by federal defendants is that the plaintiffs did not know of their

injury at the time and "most were unaware of the injury until long after the acts had been committed." (District memorandum at p.34). While this is true, it hardly goes to diminish their claim for damages. Several plaintiffs testified to the shock and hurt of learning that friends had been informants and of the effect this experience has had on their willingness to trust new people who come to political affairs. While this injury may not have been intended by the defendants, it is a very real one and one for which the defendants are legally responsible. Restatement of the Law, Torts, §7,9 and 12.

CONCLUSION

For all the reasons stated above, the plaintiffs respectfully submit that the District of Columbia defendants' motion for judgment notwithstanding the verdict, a new trial, or remittitur should be denied.

Respectfully submitted,

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Certificate of Service

I certify that a copy of the foregoing Memorandum of Points and Authorities in Opposition to District of Columbia Defendants' Motion for Judgment Notwithstanding the Verdict or, Alternatively, For a New Trial or Remittitur was mailed postage prepaid this 10th day of February, 1982 to David H. White, Civil Division, Department of Justice, Washington, D.C. 20530 and Laura Bonn, Assistant Corporation Counsel, District of Columbia Building, 14th & E. Streets, N.W., Washington, D.C. 20004.

Anne Pilsbury

Anne Pilsbury

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs v JERRY V. WILSON, et al., Defendants	Civil Action No. 76-2631

ORDER

Upon consideration of the District of Columbia defendants' motion for judgment notwithstanding the verdict, a new trial, or a remittitur, it is this _____ day of _____, 1982 hereby ordered that the same hereby is denied.

_____
JUDGE, U.S. DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

RECEIVED JAN 6 1982

JULIUS HOBSON, et al. :

Plaintiffs :

v. : Civil Action No. 76-1326

JERRY WILSON, et al. :

Defendants :

SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DISTRICT OF COLUMBIA DEFENDANTS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR A REMITTITUR

In addition to its memorandum of points and authorities filed December 31, 1981, the District of Columbia submits the attached Appendix to Part II A embodying specific inconsistencies in the verdict regarding conspiracy, statute of limitations and immunity.

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JUDITH W. ROGERS
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John H. Suda (for)
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplement Memorandum of Points and Authorities in Support of Motion of District of Columbia Defendants for Judgment Notwith-

standing the Verdict Or, In the Alternative For A New Trial Or, in the Alternative, for a Remittitur, was mailed, postage prepaid, to Daniel M. Schember, Esq., Attorney for Plaintiffs, 1712 N Street, N.W., Washington, D.C. 20036; and David White, Esq., Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530 this 4 day of January, 1982.

George W. Barclay
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APPENDIX TO PART II A.

Inconsistencies regarding Conspiracy, Statute of Limitations and Immunity.

There were findings of conspiracy and applicability of the statute of limitations and immmunity defenses as to some plaintiffs but not all, and as to some defendants, but not all, with no corresponding distinctions in the evidence. These inconsistencies are demonstrated by a review of the jury findings with regard to each plaintiff:

a) Sammie Abbott

(1) Conspiracy

Metropolitan Police Department Conspiracy

All the District defendants were found to be involved in a conspiracy which was comprised of the members of the Metropolitan Police Department.

There was no evidence presented at trial to substantiate a claim that a civil conspiracy existed amongst the members of the Metropolitan Police Department. Defendant Wilson was then Chief of Police, and unaware of the day to day activities of the Intelligence division; defendant Suter was not in the Intelligence Division for the entire period of time between 1968-1974, and therefore could not possibly be aware of the day to day activities. Defendant Bynum was only in the Intelligence Division from 1968 through 1969 and Ann Kolego-Markovich did not begin working for the Metropolitan Police Department until 1971.

Joint Conspiracy

Defendants Wilson, Herlihy, Acree, Scrapper, Jagen, Suter and the District of Columbia were found liable for participating in a joint conspiracy with the federal defendants. Defendants Bynum, Kolego-Markovich and Mahoney were found not to be involved in this joint conspiracy between the District defendants and the federal defendants. More specifically, defendant Bynum was the only District defendant that had any contact with plaintiff Abbott.

Furthermore, defendant Bynum was found not liable individually. It is therefore, clearly inconsistent that all District defendants except Bynum would be found individually liable; participants in the M.P.D. conspiracy; and then found liable under a joint conspiracy claim.

(2) Immunity

Defendants Bynum and Kolego-Markovich were found "immune" from responsibility by the jury in this case with respect to the claims of plaintiff Abbott. All other District defendants except the District of Columbia were found "not immune". This is clearly inconsistent with the evidence presented at trial. If defendants Bynum and Kolego-Markovich were immune from their responsibility, this immunity would also be enjoyed by their supervisors in the Intelligence Division since all District defendants were found to be involved in a conspiracy and each would be liable for the acts of the others. If its employees are not found liable, neither should the District of Columbia.

(3) Statute of Limitations

The jury found that plaintiff Abbott's claims against defendants Bynum and Kolego-Markovich were barred by the statute of limitations. Yet, the jury simultaneously found that the statute of limitations did not bar plaintiff Abbotts claims as to the other District defendants. Given the jury's finding of a conspiracy and given the fact that the evidence as to the statute of limitations defense did not differ among the District defendants, the jury could not logically bar the claims as to two District defendants based on the statute of limitations and not bar the claims as to the other District defendants.

b) Abe Bloom

(1) Conspiracy

Metropolitan Police Department Conspiracy

All the District defendants were found
plaintiffs claim that they were involved in
within the Metropolitan Police Department.

Joint Conspiracy

The following District defendants were
involved in a joint conspiracy between the
Police Department and the FBI: Wilson, He
Scrapper, Jagen, Suter and the District of
Defendants Bynum, Mahoney and Kolego-Mark
found liable under the joint conspiracy t

This finding by the jury is clearly
the evidence presented at trial. The sam
presented against all defendants with res
between the Metropolitan Police and FBI.
is no stronger or more convincing evide
finding of liability for all District de
Bynum, Mahoney, and Kolego-Markovich.

(2) Immunity

Defendants Bynum and Kolego-Markov
"immune" from responsibility by the jur
All other District defendants except th
Columbia were found "not immune". This
consistent with the evidence presented
jury finding that these defendants were
M.P.D. conspiracy. If defendants Bynu
are immune from their responsibility t
also be enjoyed by their supervisors i
Division, and their fellow officers an
If its employees are not found to be
the District of Columbia.

(3) Statute of Limitations

The jury found that the claims o
against defendants Bynum and Kolego-M
by the statute of limitations. Yet t

found that the statute of limitations did not bar plaintiff Bloom's claims as to other District defendants. Given the jury's finding of a conspiracy and given the fact that the evidence as to the statute of limitations defense did not differ among the District defendants, a jury could not logically bar the claims as to two District defendants based on the statute of limitations and not bar the claims as to the other District defendants.

c) Reginald Booker

(1) Conspiracy

Metropolitan Police Department Conspiracy

With respect to plaintiff Booker only defendants Wilson, Herlihy, Bynum and the District of Columbia were found liable under a conspiracy with respect to the Metropolitan Police Department. Plaintiffs presented evidence that only one conspiracy existed amongst M.P.D. Officers. This finding would be clearly inconsistent with the verdict in favor of other plaintiffs Abbott and Bloom where all District defendants were found to be liable on the M.P.D. conspiracy claims.

Joint Conspiracy

The following District defendants were found liable under a joint conspiracy theory with respect to plaintiff Booker: Wilson, Herlihy; and the District of Columbia. This finding is clearly inconsistent with other findings in favor of various plaintiffs and against certain District defendants.

(2) Immunity

Defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego-Markovich were all found "immune" from responsibility with respect to this plaintiff's claims. This finding of immunity is inconsistent with the findings of "no immunity" as against the other District defendants with respect to the claims of other plaintiffs. In view of the fact that

all plaintiffs have claimed the same activities resulted in their injuries, and the jury has found there was an M.P.D. conspiracy, it would appear that defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego-Markovich would enjoy the same immunity as to all plaintiffs. Further, defendants Wilson and Herlihy, as supervisors of these defendants would also be immune from liability. If its employees are not found liable, neither should the District of Columbia.

(3) Statute of Limitations

The jury found that plaintiff Booker's claims were barred as against defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego-Markovich. This finding is clearly inconsistent with the evidence presented at trial and findings made with respect to plaintiffs Abbott and Bloom.

c) David Eaton

(1) Conspiracy

Metropolitan Police Department Conspiracy

Defendants Wilson, Herlihy, Bynum and the District of Columbia were found liable under a conspiracy with respect to the Metropolitan Police Department. Plaintiffs have presented evidence that there was only one conspiracy amongst Metropolitan Police Department officers. Therefore, this finding would be clearly inconsistent with the award in favor of other plaintiffs Abbott and Bloom where all District defendants were found to be liable on the Metropolitan Police Department conspiracy claim.

(2) Immunity

Defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego-Markovich were all found "immune" from responsibility in this plaintiff's verdict form. This finding of immunity is inconsistent with the findings of "no immunity" as against other District defendants with respect to the claims of other plaintiffs. In view of the

fact that all the plaintiffs have claimed the same activities resulted in their injuries, it would appear that defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney, and Kolego-Markovich would enjoy the same immunity as to all plaintiffs. Further, defendants Wilson and Herlihy, as supervisors of these defendants would also be immune from liability.

(3) Statute of Limitations

The jury found that plaintiff Eaton's claims were barred as against defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego-Markovich. This finding is clearly inconsistent with the evidence presented at trial and the finding made by the jury with respect to plaintiffs Abbott and Bloom.

e) Tina Hobson

(1) Conspiracy

Metropolitan Plice Department Conspiracy

With respect to plaintiff Hobson, District defendants Wilson, Herlihy and the District of Columbia were found to have participated in an M.P.D. conspiracy. This finding would be inconsistent and incompatible with the findings of other plaintiffs such as Abbott and Bloom where the jury found that all the District defendants were found liable for the M.P.D. conspiracy.

(2) Immunity

Defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego - Markovich were all found "immune" from responsibility in this plaintiff's verdict form. This finding of immunity is inconsistent and incompatible with other findings of no immunity as made against District defendants with respect to the claims of others plaintiffs. In view of the fact that all plaintiffs have claimed the same activities resulted in their injuries it would appear that defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego - Markovich would also enjoy the same immunity as to all plaintiffs. Further, defendants Wilson and Herlihy, as supervisor of these defendants would also be immune from liability.

(3) Statute of Limitations

The jury found that plaintiff Hobson's claims were barred as aginst defendants Acree, Bynum, Scrapper, Jagen, Suter, Mahoney and Kolego - Markovich. These findings are inconsistent with the evidence presented at trial as well as the findings made against plaintiffs Abbott, Bloom

f) Richard Pollack

(1) Conspiracy

Metropolitan Police Department Conspiracy

Plaintiffs presented evidence that there was one conspiracy among the police officers in the Intelligence Division. The jury's findings with respect to plaintiff Pollack indicate that all District defendants except Bynum were found liable for their participation in this conspiracy. However, this finding is clearly inconsistent with the findings in favor of plaintiffs Booker, Eaton and Bloom where Bynum was found to be a member of the M.P.D. conspiracy.

Joint Conspiracy

With respect to the findings of a joint conspiracy all defendants except for Acree and Kolego - Markovich were found liable. This is clearly inconsistent with the evidence presented at trial which indicated that the only contact between the FBI and M.P.D. was for law enforcement purposes. Also, based on the evidence presented at trial, defendant Acree was found liable on the joint conspiracy theory with respect to plaintiffs Bloom and Washington Peace Center and not with respect to the other plaintiffs.

(2) Immunity

With respect to plaintiff Pollack, all District defendants except Bynum and Kolego-Markovich were found liable on the immunity claim for their actions during this time period. This finding is directly inconsistent with the findings of plaintiffs Hobson, Booker and Eaton, where all District defendants except Wilson and Herlihy were found immune with respect to their actions. In view of the fact that all plaintiffs claimed injuries from the same category of activities which they claim the defendants were involved, the District defendants would enjoy immunity with respect to all plaintiffs.

In addition, their supervisors, defendants Wilson and Herlihy would also share this immunity.

Finally, if the defendant-employees are found to be immune from liability, so would their employer, District of Columbia.

(3) Statute of Limitations

The jury found that plaintiff Pollack's claims were barred by the statute of limitation with respect to defendants Bynum and Kolego - Markovich. This finding is clearly inconsistent with the findings of other plaintiffs Booker and Eaton and contains the same inconsistencies in the verdict as returned for plaintiffs Abbott and Bloom.

g) Arthur Waskow

(1) Conspiracy

Metropolitan Police Department Conspiracy

All District defendants except Bynum were found to be involved in the Metropolitan Police Department conspiracy. This finding is inconsistent with findings made for other plaintiffs such as Booker and Eaton, where Bynum was also found liable as a part of this conspiracy.

Joint Conspiracy

The jury findings indicate that with respect to plaintiff Waskow that all District defendants except for Acree, Bynum, Jagen and Kolego - Markovich were involved in a joint conspiracy with the FBI. This finding is inconsistent with the findings against plaintiffs Pollack and Bloom where these defendants were also found liable for their participation in the joint conspiracy.

(2) Immunity

The jury found defendants Bynum and Kolego - Markovich "immune" from responsibility for their activities in this case. This finding of immunity is clearly inconsistent with the findings of immunity with respect to other plaintiffs' claims and the evidence produced at trial. In view of the fact that all plaintiffs claims were based on the same actions of the defendants, it would appear that if some defendants were immune for their actions with respect to some plaintiffs, than all defendants should be immune with respect to all plaintiffs. If this is found to be the case, certainly the District of Columbia cannot be held liable if its servants are excused from liability.

(3) Statute of Limitations

Based on the jury's findings, plaintiff Waskow's claims against defendants Bynum and Kolego - Markovich were barred by the statute of limitations. This finding

is clearly inconsistent with other jury findings against plaintiffs Hobson, Booker, and Eaton which barred their claims against several other defendants.

h) Washington Peace Center

(1) Conspiracy

Metropolitan Police Department Conspiracy with respect to plaintiff Washington Peace Center

The jury verdict reflects that all District defendents were found to have participated in the Metropolitan Police Department Conspiracy. This finding is inconsistent with the verdicts returned for plaintiffs Booker, Eaton, Hobson, and Waskow where various defendants were found not to have participated in the conspiracy among the Metropolitan Police Department officers.

Joint Liability

The jury found that all District defendants except for Bynum, Jagen and Kolego - Markovich were involved in a joint conspiracy with the FBI. This finding is clearly inconsistent with the verdict returned in favor of plaintiff Waskow were defendants Acree, Bynum, Jagen and Kolego - Markovich were not found to be involved in a joint conspiracy; or with the verdict for plaintiff Pollack where all District defendants (including Jagen) were found to be involved in the joint conspiracy except for Bynum and Kolego - Markovich.

(2) Immunity

The jury found defendants Bynum and Kolego - Markovich "immune" from responsibility for their activities in this case. This finding of immunity is clearly inconsistent with the finding of immunity with respect to other plaintiffs' claims and the evidence produced at trial. In view of the fact that all plaintiffs claims were based on the same actions of defendants, it would appear that if some defendants were immune for their actions with respect to some plaintiffs, that all defendants should be immune with respect to all plaintiffs.

If this is found to be the case, certainly the District of Columbia cannot be held liable if its servants are excused from liability.

(3) Statute of Limitations

The jury found that plaintiff Washington Peace Center's claims were barred by the statute of limitations with respect to defendants Bynum and Kolego - Markovich. This finding is clearly inconsistent with the evidence and findings of other plaintiffs Abbott, Bloom, Booker and Eaton.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.	:	
Plaintiffs	:	
v.	:	Civil Action No. 76-1326
JERRY WILSON, et al.	:	
Defendants	:	

MOTION OF DISTRICT OF COLUMBIA DEFENDANTS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL OR, IN THE ALTERNATIVE FOR A REMITTITUR

Pursuant to Rules 50(b) and 59, Federal Rules of Civil Procedure, the District of Columbia defendants respectfully move this Court to set aside the verdict returned by the jury in the above entitled cause on December 23, 1981, and notwithstanding the same, to enter judgment in their favor. In the alternative, the District of Columbia defendants move this Court to grant them a new trial or to grant a substantial remittitur. In support of their motion, the District of Columbia defendants rely upon the following grounds:

1. The District of Columbia defendants were entitled to a directed verdict upon their motions at the close of plaintiffs' case and at the close of all the evidence on the grounds that no reasonable jury could have found liability against the District of Columbia defendants based on the evidence introduced at trial. More specifically:

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* The District of Columbia defendants joining in this motion are as follows: Jerry Wilson; Thomas Herlihy; Jack Acree; Christopher Scrapper; Edward Jagen; George Suter; John Mahoney; and the District of Columbia.

a. There was, as a matter of law, insufficient evidence (and in some instances no evidence) that particular District defendants violated any rights of particular plaintiffs or proximately caused these plaintiffs any compensable injury.

b. Neither the District of Columbia nor its officials were subject to the provisions of 42 U.S.C. §1985(3) at any time relevant to this lawsuit.

c. Plaintiffs have not proven that a civil conspiracy existed between District of Columbia defendants and the federal defendants.

d. No evidence was introduced to overcome the qualified immunity enjoyed by the District's police officers and agents.

e. Intelligence gathering operations do not inhibit First Amendment rights absent an existent or imminently threatened governmental sanction.

f. Plaintiffs have not proven a cause of action under 18 U.S.C. §2520 or D.C. Code, §23-554 (1973).

g. An exchange of information between local and national governments is a lawful and necessary activity.

h. Plaintiffs' claims were barred by the applicable statute of limitations.

i. The District of Columbia cannot be held liable in Constitutional tort under the theory of respondeat superior.

j. District of Columbia defendants are not liable for punitive damages absent a showing of actual malice or wanton and/or reckless disregard for the rights of others.

2. The verdicts returned by the jury were inconsistent and incompatible on their face. More specifically:

a. There were findings of conspiracy and applicability of the statute of limitations and immunity defenses as to some plaintiffs but not all, and as to some defendants but not all, with no corresponding distinctions in the evidence.

b. The verdict multiplies compensation to each plaintiff for each specific injury by as much as a factor of 13, the number of defendants listed on the verdict form against whom a verdict was returned.

c. Although the District of Columbia is merely the employer of the individual District defendants and can only act through its employees and not separately from them, the jury awarded separate and higher damages against the District, in addition to the awards against individual District employees.

d. Although the vast majority of the evidence at trial was presented against the federal defendants, the verdict awards almost two-thirds of the total damages against the District of Columbia defendants.

3. The jury verdict form, employed by the Court over defendants' objections, permitted the jury to make inconsistent findings and to compensate each plaintiff more than one time for a particular injury with the results indicated in ground numbered 2 above.

4. The District defendants were entitled to a mistrial based on the unfair advantage resulting from the unauthorized and improper contact between a discharged juror and plaintiffs' agents while trial was still in session.

5. The jury verdict in this case bears no reasonable relationship to the injuries proved and accordingly is excessive as a matter of law.

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JOHN H. SUDA
Deputy Corporation Counsel, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the District of Columbia Motion of Judgement Notwithstanding the Verdict, in the Alternative For a New Trial or, In the Alternative for a Remittitur, together with Memorandum of Points and Authorities in Support thereof and Orders was mailed, postage prepaid, to Daniel M. Schember, Esquire, Attorney for Plaintiffs, 1712 N Street, N.W., Washington, D.C. 20036; and David White, Esquire, Attorney for Federal Defendants, Department of Justice, Washington, D.C. 20530, this 31st day of December, 1981.

Assistant Corporation Counsel, D.C.
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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.	:	
Plaintiffs	:	
v.	:	Civil Action No. 761326
JERRY WILSON, et al.	:	
Defendants	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DISTRICT OF COLUMBIA DEFENDANTS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE FOR A NEW TRIAL OR, IN THE ALTERNATIVE, FOR A REMITTITUR

Preliminary Statement

This civil action was commenced on July 16, 1976, by individuals and organizations claiming to have been active during the late 1960's and early 1970's in various political activities in the District of Columbia.

Plaintiffs allege that from 1968 to 1973 the defendants engaged in certain activities which, according to the plaintiffs, violated their First Amendment Rights and caused them injury.

Plaintiffs premise their cause of action on the First, Fourth, Fifth and Ninth Amendments to the Constitution of the United States, 42 U.S.C. §§1985(3) and 1986, the relevant United States Code sections governing interception of oral communications and common law torts of trespass, conversion and invasion of privacy. Jurisdiction is alleged under 28 U.S.C. §§1331, 1343, 1337 and 1355.

A final pretrial order was issued on November 23, 1981, which defined the issues to be presented at trial. The trial in this matter commenced on November 23, 1981 and ended on December 11, 1981. Motions for a directed verdict were made at the close of plaintiffs' case as well as at the close of all the evidence. These motions were denied by the

Court, except for the dismissal of certain named District defendants against whom plaintiffs had failed to present any evidence at all to support their claims.[1]

The case was submitted to the jury on December 17, 1981, along with a special verdict form to which the District defendants had objected. The jury deliberated for approximately four days and returned with a verdict in the total amount of $449,437.50 against the District defendants and $262,500.00 against the federal defendants. Of the total award against the D.C. defendants, $145,937.50 was awarded against individual agents of the District of Columbia and an additional sum of $303,500 was awarded directly against the District of Columbia. A verdict was returned in favor of defendants Harold Bynum and Ann Kolego Markovich as against all plaintiffs.

The District of Columbia defendants move this court to grant them a judgment notwithstanding the verdict or, in the alternative, a new trial or, in the alternative a remittitur. The grounds for this relief are set forth in the District of Columbia on defendants' motion and are discussed dismissed at length below.

1/ The following named District defendants were dismissed at the close of all the evidence: John B. Layton, Robert L. Zink, Albert W. Ferguson, Theodore R. Zanders, Dixie Gildon, Carl Shoffler, James Binsted, Dorie Binsted, Roger O. Day, and Thomas Fulcher. Thomas Fulcher was neither employed by the Metropolitan Police Department nor served with a summons in this case.

Argument

I.

The District of Columbia defendants were entitled to a directed verdict upon their motions at the close of plaintiffs' case and at the close of all the evidence on grounds that no reasonable jury could have found liability against the District of Columbia defendants based on the evidence introduced at trial.[2]

The defendants in a civil case are entitled to a directed verdict if no reasonable jury, viewing the evidence in a light most favorable to the plaintiffs, could properly return a verdict for the plaintiffs.[3]

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2 The summary of testimony is compiled from the best recollection of defense counsel, since no transcript of the proceedings has yet been obtained.

3 Even where there is sufficient evidence to prevent a directed verdict, it is the trial court's duty to set aside a verdict which is contrary to the weight of the evidence and to grant a new trial to prevent a miscarriage of justice. As was stated by the United States Court of Appeals for the District of Columbia Circuit in Eastern Airline v. Union Trust Co., 99 U.S. App. D.C. 205, 209-210, 239 F.2d 25, 29-30 (1956), cert. den., 353 U.S. 942:

> "***On such a motion [for a new trial] it is the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right.
>
> * * *
>
> We conclude on the authorities and on reason as well, that the trial judge had the power and duty to grant a new trial if the verdicts were against the clear weight of the evidence, or if for any reason or combination of reasons justice would miscarry if they were allowed to stand; and that this court has the power and duty to reverse and order a new trial if the trail judge abused his discretion in denying the motion therefor.
>
> * * *"

Of course, as discussed in the text above, the absence of any substantial evidence of liability in the case at bar requires not merely an order granting a new trial, but a judgment for defendants, notwithstanding the verdict.

"The question of law presented by the motions for a directed verdict 'is not whether there is any evidence -- a mere scintilla is not sufficient -- but whether there is any upon which a jury could properly find a verdict for the party upon whom the onus of proof is imposed.'" [Pepsi Cola Co v. Waddell, 304 A. 2d 630, 632 (D.C. App. 1973), quoting Baker v. D. C. Transit System, Inc., 248 A. 2d 829, 831 (D.C. App. 1969)].

I.a. Insufficient Evidence

There was, as a matter of law, insufficient evidence (and in some cases no evidence) that particular District defendants violated any rights of particular plaintiffs or proximately caused these plaintiffs any compensable injury. The complaint alleges that from 1968 to 1973 the defendants engaged in certain activities which violated plaintiffs' First Amendment rights and caused them injury. The activities allegedly undertaken against each plaintiff are as follows:

(1) using undercover agents to fraudulently gain entry to private meetings to learn the plans and programs of plaintiffs; (2) electronic surveillance without judicial authorization; (3) breaking and entering to obtain membership lists and other private political documents; (4) mail interception; (5) physical surveillance, that is, surreptiously following plaintiffs or monitoring plaintiffs' political activities; and (6) disrupting and interfering with plaintiffs' political activities by (a) urging violent or unlawful actions and (b) supplying the public and/or news media with false information about the plaintiffs and their plans.

It is essential to examine the testimony presented by each plaintiff and by the District defendants in order to establish that the evidence actually produced at trial did

not support a finding of liability against the District of Columbia defendants.

a. Testimony Relating to Plaintiff Sammie Abbott

Plaintiff Abbott testified at trial that he was an active member in an organization known as the Emergency Committee on the Transportation Crisis (hereinafter referred to as ECTC) and also held the position of publicity director in that organization. Through his activities in ECTC, Abbott testified that he had met D.C. defendant Harold Bynum in approximtely 1969. Abbott testified that defendant Bynum had attended several public meetings of ECTC but never actively participated in any discussions at these meetings. Abbott further testified that he met defendant Bynum through plaintiff Booker and maintained a cordial relationship with defendant Bynum, and even on one occasion invited Bynum to his home for dinner. Abbott testified that defendant was neither disruptive at ECTC meetings nor an advocate of any violence-prone activities. In early 1970, Abbott testified, he hadn't seen defendant Bynum in several months but he ran into him in District Court dressed in full police uniform. Abbott testified that they exchanged hellos and then defendant Bynum left.

Defendant Bynum testified that he never had any contact with the FBI, nor relayed any of the information he reported to the FBI. Additionally, defendant Bynum testified that he had no knowledge of the FBI programs in effect at that time, nor did he participate in them.

The only other evidence offered to support plaintiff Abbott's claims against the District defendants involved testimony by plaintiff Abbott concerning a demonstration on November 16, 1969, which was to be held at Georgetown

University Campus to protest the construction of a freeway at the site of the proposed Three Sister's Bridge. The demonstation was planned to be a peaceful one and Abbott testified that an unidentified Metropolitan police officer had warned him prior to the demonstation not to march down to the site of the Three Sister's Bridge or the demonstrators would be tear gassed. Abbott testified that as a crowd of demonstrators gathered on the Georgetown University Campus, he instructed the demonstrators not to march down to the site, but two white males from the crowd interrupted him and called him a "sell-out." Thereafter, a group demonstrators split from the core group and headed toward the construction site. Abbott left the demonstration prior to the splinter group marching off the campus. In 1974, someone identified one of the provocators to Abbott as Jan Francis, a Metropolitan Police Department officer. There was no testimony that Jan Francis was an officer in the Intelligence Division or under the supervision of any of the named defendants.

Based on the testimony relating to plaintiff Abbott the only injuries he theoretically received were the supposed loss of an opportunity to demonstrate in the November 16, 1969 demonstration and the fact that defendant Bynum attended meetings where plaintiff Abbott was also present. The jury determined that defendant Bynum's activities did not warrant a finding of liability against him. Morover, there was no evidence presented that the District defendants harmed plaintiff Abbott by: (1) using undercover agents to fraudulently gain entry to private meetings to learn the plans and programs of plaintiffs; or (2) electronic surveillance without judicial authorization; or (3) breaking and entering to obtain membership lists and other private political documents; or (4) mail interception; or (5)

physical surveillance, that is, surreptiously following plaintiffs or monitoring plaintiffs' political activities; or (6) disrupting and interfering with plaintiffs' political activities by (a) urging violent or unlawful actions or (b) supplying the public and/or news media with false information about the plaintiffs and their plans. Thus, as to plaintiff Abbott, there was no evidence to support the allegations in the complaint, and all District defendants are entitled to a judgment notwithstanding the verdict.

b. Testimony Relating to Plaintiff Abe Bloom

Plaintiff Bloom testified that he was an active member of the Washington Mobilization Committee (hereinafter WMC) as well as the Washington Area Peace Action Coalition (hereinafter WAPAC). While active in WAPAC Bloom became acquainted with defendant Jagen. Defendant Jagen attended meetings of WAPAC and did volunteer work in the WAPAC offices.

Defendant Jagen testified that he infiltrated the WAPAC organization in order to obtain information on splinter groups which might be more prone to violence and destruction of property. Although Jagen attended meetings, the testimony revealed that the he never removed anything from the WAPAC offices or in any any way disrupted the activities of WAPAC. The actions of defendant Jagen amounted to nothing more than mere infiltration of an orginization for purposes of fulfilling a governmental investigatory task. Investigative activity by government law enforcement agents which does not cause specific objective harm or threaten specific future harm does not violate the constitutional rights of plaintiffs. Laird v. Tatum, 408 U.S. 1(1972).

There was no evidence presented that the District defendants directed any of the six activities alleged in the complaint (and listed above) against plaintiff Bloom. Thus, all District defendants are entitled to a judgment notwithstanding the verdict as to plaintiff Bloom.

c. Testimony Relating to Reginald Booker

Plaintiff Booker testified that he became acquainted with defendant Bynum in 1968 at which time he was active in an organization known as the Emergency Committee on the Transportation Crisis (hereinafter referred to as ECTC). Booker testified that defendant Bynum began a attending meetings of this organization and even accompanied him to a convention in Toledo, Ohio. At these meetings defendant Bynum never took an active part in the discussions nor attempted to change the peaceful orientation of the organization to more radcial means.

In 1969, plaintiff Booker was informed by someone that defendant Bynum was a police officer. Booker testified that he did nothing further at that time to investigate these allegations against Bynum. A year later, in 1970, Booker was again informed that defendant Bynum was a police officer. Booker testified that the source of his information was a friend who had seen Bynum in full police uniform at District Court. Plaintiff Booker did not recall seeing defendant Bynum again and he testified that Bynum stopped attending meetings of ECTC in 1970.

The testimony at trial revealed that the only injuries alleged by plaintiff Booker with respect to District defendants resulted from the presence of defendant Bynum at ECTC meetings. Defendant Bynum testified that he was attending these meetings in order to ascertain the location of future

demonstrations, number of people predicted to attend and the purpose of the demonstration. Bynum testified that he believed this assignment to be a necessary and lawful activity to assist the police department in monitoring demonstrations. As noted above, this sort of investigative activity which does not cause or threaten specific objective harm does not violate the constitutional rights of plaintiffs, and allegations or proof of subjective "chill" in the exercise of rights is not compensable in damages. Laird v. Tatum, supra, 408 U.S. 1 (1972). Moreover, the jury found defendant Bynum to be not liable. There was no evidence presented at trial that the District defendants directed any of the six activities alleged in the complaint, against plaintiff Booker. Thus the District defendants are entitled to a judgment notwithstanding the verdict as to plaintiff Booker.

d. Testimony Relating to Plaintiff David Eaton

Plaintiff Eaton did not testify to any damages at all which were proximately caused by any of the D.C. defendants. His entire testimony concerned on the activities of the FBI and the injuries he sustained as a result of this activity.

The only additional testimony presented with respect to the activities of plaintiff Eaton was from defendant Bynum. Bynum testified that he attended Black United Front meetings while in the Intelligence Division for one year. He testified that he knew of plaintiff Eaton but did not investigate his activities. Instead, Bynum testified that he was "merely an observor " at these meetings and reported information on demonstrations to the Metropolitan Police Department such as time, place and the number of people that were predicted to attend a demonstration.

The evidence demonstrated that defendant Bynum had never met plaintiff Eaton nor had an personal contact with him. Bynum went on to testify that he never considered plaintiff Eaton or the Black United Front to be a violence-prone organization and that his police functions were merely investigatory for purposes of gathering data. In any event, as noted above, the jury found in favor of defendant Bynum.

Thus, was no evidence at all presented to support allegations that the District defendants were involved in any improper activities with respect to plaintiff Eaton or that the District defendants caused him any harm. On this state of the evidence, the District defendants are entitled to a judgment notwithstanding the verdict.

e. Testimony Relating to Plaintiff Tina Hobson

There was no testimony at all presented at trial that any of the injuries allegedly sustained by plaintiff Hobson were the result of acts or actions of the District of Columbia defendants.

The only testimony which remotely relates to any involvement of the Metropolitan Police Department with plaintiff Hobson was her testimony that one demonstration on Capital Hill was interrupted by smoke bombs set off, she thought, by the police. Mrs. Hobson admitted on cross-examination that she did not actually see the police set off the smoke bombs. As a result of the smoke bombs the demonstration was not as orderly as planned and plaintiff Hobson claims to have thereby suffered a loss of her First Amendment rights. Nevertheless, plaintiff Hobson testified that this incident had no real effect on her political involvement during this period of time.

Once again it is clear that there was no evidence at all presented at trial that the District defendants directed any of the six activities alleged in the complaint against plaintiff Hobson. Therefore, the District defendants are entitled to a judgment notwithstanding the verdict.

f. Testimony of Plaintiff Richard Pollack

Plaintiff Pollack testified that he was active in numerous organizations during the relevant period of time involved in this lawsuit. In the summer of 1971 he became acquainted with defendant Ann Kolego Markovich through her work as a volunteer in the Office of the Peoples Coalition for Peace and Justice (hereinafter PCPJ). According to the testimony of Pollack, defendant Kolego Markovich attended numerous meetings of PCPJ and was often "volatile and disruptive" during these meetings. He testified that during one meeting defendant Kolego Markovich suggested that members of PCPJ push over buses in front of the White House in order to be noticed. These suggestions were not accepted by the majority of the members of the organization. Pollack also testified that he had seen defendant Kolego Markovich at a demonstration at the Capitol Building in the fall of 1971 and saw her yelling profanities at the police in addition to throwing objects at these police and urging others attending the demonstration to do the same.

However, the jury either did not believe plaintiff Pollack's testimony or they determined that defendant Kolego Markovich's conduct did not warrant a finding of liability against her, since the jury returned a verdict in her favor. Given that there was no other testimony presented by plaintiff Pollack to support his claim of injuries by the D.C. defendants, the said defendants are clearly

entitled to a judgment notwithstanding the verdict as to plaintiff Pollack.

g. Testimony Relating to Plaintiff Arthur Waskow

Plaintiff Waskow testified that during the relevant times periods involved in this lawsuit he was employed at the Institute for Policy Studies (hereinafter IPS) in addition to being active in numerous antiwar organizations. Waskow testified that in 1971 he became acquainted with Robert Merritt, a volunteer who worked at IPS and was later identified to Waskow as an informant for the Metropolitan Police Department. Plaintiff Waskow testified that his relationship with Merritt was tenuous at best, because he doubted the credibility of Merritt and always felt that his "demeanor appeared to be a little shaky." The only other evidence presented at trial with respect to injuries allegedly sustained by plaintiff Waskow by the Metropolitan Police Department was a note in his FBI file that the Metropolitan Police Department had gotten a typewriter ribbon from Waskow's typewriter and turned it over to the FBI. Moreover, plaintiff Waskow did not testify as to any damages sustained as a result of these incidents.

The only other evidence that was presented with respect to plaintiff Waskow came from a sworn statement of Charles Marcum. In his statement Marcum indicated that he had monitored a frequency and intercepted the voice of Arthur Waskow. There was no indication from the statement whether this interception was made pursuant to a lawful wiretap or with the consent of one party.

Based on the testimony presented at trial there was no evidence that plaintiff Waskow was injured by any of these incidents or that any of the District defendants were

directly involved in any improper conduct. Given these circumstances, the District defendants are entitled to a judgment notwithstanding the verdict as to plaintiff Waskow.

h. Testimony of Washington Peace Center

Testimony on behalf of plaintiff Washington Peace Center was given by Dr. Victor Kaufman and Mr. C. Edward Behre. All of the testimony indicated that the injuries sustained, if any, by the Washington Peace Center resulted from activities of the FBI. There was no testimony that the activities of the Metropolitan Police Department interfered in any way with the activities of this plaintiff.

In fact the only evidence introduced by plaintiff Washington Peace Center against the District of Columbia defendants was a portion of the statement of Thomas Okeson, a former member of the Metropolitan Police Department who stated that he use to hang around the Washington Peace Center and copy addresses that were on their file cards.

Based on the testimony, there was no evidence to substantiate plaintiff's claim that the District of Columbia defendants directed any of the six activities listed in the complaint against plaintiff Washington Peace Center.

In sum, plaintiffs failed to produce sufficient evidence that District of Columbia defendants violated any rights of particular plaintiffs or proximately caused these plaintiffs any compensable injuries. Thus, all District of Columbia defendants were entitled to a directed verdict during trial, and they are now entitled to a judgment notwithstanding the verdict as to all plaintiffs.

I.B and I.C. §1985(3) and Civil Conspiracy

Neither the District of Columbia nor any of its officials were subject to the provisions of 42 U.S.C. § 1985(3) at any time relevant to this lawsuit. That provision, like 42 U.S.C.§1983, derives from the Civil Rights Act of 1871, 17 Stat. 13, entitled "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes" The 1871 Act was popularly known as the "Ku Klux Klan Act", and , like the Amendment upon which it is based, has only limited scope and application. In District of Columbia v. Carter, 409 U.S. 418, 93 S.Ct. 602, 34 L.Ed 2d 613 (1973), the Supreme Court held that Congress, in enacting the KKK Act of 1871, did not intend to include the District of Columbia within the meaning of the words "State or Territory" as used in the statute.[4] See also Sullivan v. Murphy, 478 F.2d 938, 960, 156 U.S. App. D.C. 28 (1973), cert. denied. 414 U.S. 880, 94 S. Ct. 162, 38 L.Ed. 2d 125.

This court, in its Final Pretrial Order, concluded that §1985(3) would apply to District of Columbia officials because §1985(3), unlike §1983, "applies to prescribed actions taken by any person, irrespective of that person's official capacity, in any "State or Territory". While this observation may be correct, it does not decide the issue of

4 By P.L. 96-170, §1, 93 Stat. 1284, Act. Dec. 29, 1979 Congress amended 42 U.S.C.§1983 to include the District of Columbia within the provisions of that statute. Section 3 of the Amendment privided that the Act "shall apply with respect to any deprivation...occurring after the date of the enactment of this this Act [enacted Dec. 29, 1979]" Since the acts which gave rise to that lawsuit occurred in the period 1968 to 1973, the 1979 amendment would not be relevant here.

whether §1985(3) can be employed by the plaintiffs in this case. Section 1985(3), like Section 1983, does contain the words "State or Territory". In fact, the statute prescribes only conspiracies and certain conduct occurring "in any State or Territory." Since the words "State or Territory" as used in the KKK Act of 1871 (from which §1985(3) is derived) did not include the District of Columbia (See D.C. v. Carter, supra) and since all relevant actions by the District defendants allegedly occurred within the District of Columbia, the provisions of 42 U.S.C. §1985(3) are inapplicable by their own terms.

Hurd v. Hodge, 334 U.S. 24 (1948) is inapposite, since it is concerned with §1982, which unlike §1983 and §1985(3), derives from the Civil Rights Act of 1866 and not the KKK Act of 1871. The Supreme Court distinguishes these two statutes in the Carter case, supra at p. 423.

Even if, arguendo, the District defendants were amenable to suit under 42 U.S.C. §1985(3), plaintiffs have failed to state claim. Establishment of a claim under that statute requires proof that (1) two or more persons conspired for the purpose of depriving plaintiffs of the equal protection of the laws or of equal privileges and immunities under the laws; (2) there was an act in furtherance of the object of the conspiracy which injured plaintiffs in their persons or property or deprived them of having or exercising any right or privilege of a citizen of the United States; and (3) the motivation for the conspirator's actions must have been "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Griffin v. Breckinridge, 403 U.S. 88,102-103(1971).

For a conspiracy to exist, there must be some express or implied agreement among the conspirators in the object of the conspiracy See Morton Building of Nebraska, Inc.,

v. Morton Building , Inc., 531 F.2d 910, 917 (8th Cir. 1976). There must be more than mere association or common employment to constitute an agreement, unity of purpose or common design. Tyrell v. Taylor, 342 F. Supp 9 (E.D. Pa. 1975). Likewise, conspiracy among agents or servants of a single entity is not sufficient. Dombrowski v. Dowling, 451 F2d 190 (7th Cir. 1972), Johnson v. University of Pittsburg, 435 F. Supp. 1328, 1370 (W.D.Pa. 1977); Keddie v. Pennsylvania State University, 412 F. Supp. 1264 (M.D. Pa. 1976).

Here plaintiffs alleged three conspiracies (1) FBI, (2) MPD, and (3) FBI-MPD. With respect to the alleged MPD conspiracy, the evidence adduced shows only that the MPD defendants worked in the Intelligence Division during the relevant period or that their conduct was in furtherance of departmental policy. It was neither alleged nor proven that any of the District defendants did anything other than that which they perceived to be related to their mission, i.e., to obtain information on groups or individuals who were involved in demonstrations in Washington. Nor was it alleged or proven that any of the District defendants were actuated by any independent motive or purpose.

Since these defendants acted only in accordance with the directions and object of the entity by which they were employed, the jury could not properly conclude that there was a conspiracy within the MPD. See Dombrowski, supra at page 196. See also Girard v. 94th St. and Fifth Avenue Corp. 530 F.2d 66, 70-72 (2nd Cir. 1976).

Nor does plaintiffs' proof satisfy the invidiously discriminatory animus requirement. That requirement implies malice, ill will or hatred against a group or class of a degree sufficient to conclude that action taken against the group was done for an improper motive. See Robinson v.

McCorkle, 462 F. 2d 111, 113, (3rd Cir. 1972). The mission of the Intelligence Division as stated in General Order No. 7G4(a) dated December 24, 1969 and received into evidence as Defendants' Exhibit 2 was:

To gather, record and provide to appropriate elements of the Department, information on persons, groups, and organizations whose activities might be detrimental to the proper functioning of local, state, or national governments." In this regard, the function of the Security Information Section was to gather information on conspiratorial demonstrator groups that threaten/ed the security of national and local government. Neither as stated nor as applied through the acts of the District of Columbia defendants does this purpose or function evidence the invidiously discriminatory animus required under §1985(3). Nor does this purpose recognize any distinction on the basis of race, national origin, religion or any other well defined and traditionally disadvantaged group/ing. See Santiago v. City of Philadelphia, 435 F. Supp. 136, 156 (E.D. Pa.1977), Orshan v. Anker, 489 F. Supp. 820 (D.C. N.Y.1980). The "class" of which plaintiffs were members is simply too broad and too mutable to be a class within the meaning of "class based discriminatory animus". See Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973). See also Voytko v. Ramada Inn Atlantic City, 445 F. Supp. 315, 324, n. 13 (D.N.J. 1978).

Thus, the jury had no basis for concluding that a conspiracy existed within the MPD in the sense that term is used in §1985(3).

Furthermore, plaintiffs have not proven that a civil conspiracy existed between the District of Columbia defendants and the Federal defendants. To prove a civil conspiracy plaintiffs must prove (1) that the defendants

agreed to or had a common design or plan to do an unlawful act or to do a lawful act through unlawful means, (2) that the defendants committed an affirmative act in furtherance of the common plan or design, and (3) that the defendants' act or acts pursuant to the conspiracy in fact injured a plaintiff in his person or property. See Hampton v. Hanrahan, 600 F. @d 600, 620621 (7th Cir. 1979).

In this regard plaintiffs' evidence failed to establish an agreement or a common plan or design between the defendants. While proof that each conspirator knew the exact limits of the plan or the identity of all the participants therein is not required, it must be established that there was a single plan, the essential nature and general scope of which was known to each person who is to be held liable for its consequences. Hoffman LaRoche, Inc. v. Greenberg, 447 F. 2d 872 (C.A. Ill. 1971). Here, the proof established two law enforcement agencies with different functions and jurisdictions. The proof further showed that the Federal plans were zealously guarded and were designed to counteract, disrupt or neutralize elements of the New Left. The plan was also national in scope involving field offices across the country. The District of Columbia plan on the other hand, was purely informational, designed to gather information needed to effectively deal with the problems attending demonstrations in Washington, D.C. No District of Columbia defendant was shown to have knowledge of the nature or scope of the Federal plan except that obtained on an ad hoc basis. In this regard the only evidence of contact or assistance running between the two agencies was an occasional sharing of information which one agency might feel appropriate to pass on to the other agency. Such sharing of information is a legitimate law enforcement function. Philadelphia Yrly. Meet. Rel. Soc. of Friends v. Tate, 519 F.2d 1335 (3rd Cir. 1975).

Accordingly plaintiffs' evidence utterly failed to prove knowledge by the D.C. defendants of the essential nature or scope of the Federal plan. Nor did plaintiffs' evidence prove even a /tacit agreement between the two agencies. In short the only evidence connecting the two was an occasional sharing of information. As a matter of law, such evidence is insufficient to prove a conspiracy between the Federal and District of Columbia defendants under 42 U.S.C.§1985(3) or under the common law.

QUALIFIED IMMUNITY INTELLIGENCE GATHERING, 18 U.S.C. SECTION 2520, AND EXCHANGE OF INFORMATION

No evidence was introduced to overcome the qualified immunity, enjoyed by the District's police officers and agents. To establish a successful claim if qualified immunity. Those individual officers need only prove that at the time of their alleged conduct they had a reasonable and good faith belief that their conduct was lawful, Procunier v. Navarette, 434 U.S. 555(1973); Pierson v. Ray, 386 U.S. 547 (1967). Even if their conduct is found to be unlawful, qualified immunity, if those established, constitutes a complete defense. Pierson, supra, at page 357. Accordingly, where their conduct did not patently violate the plaintiffs' rights and was reasonably believed to be legal, these defendants cannot be held civilly liable. See also Bowens v. Knazze, 237 F. Supp. 826 (N.D. Ill. 1965); Tritsis v. Backer, 355 F. Supp. 225 (N.D. Ill. 1973), affirmed 501 F. 2d 1021 (7th Cir. 1974).

Applying these principles to the conduct and beliefs of the Metropolitan Police Department defendants compels a finding that they reasonably and in good faith believed their conduct was lawful. As stated earlier, the purpose and function of the Intelligence Division was to gather information on demonstrators and groups so as to be prepared for any violent or disruptive acts which might result from large scale demonstrations. Plaintiffs did not challenge the lawfulness of this purpose. Former Police Chief Jerry Wilson testified that such information was absolutely essential to ensure proper and effective deployment of MPD personnel. This policy, embodied as it was in a General Order, obligated both supervisory officials

and officers to accept their assignments as part of their duty to maintain peace and order in their jurisdiction.

The methods used to gather information were those which have traditionally been employed and which are recognized by the courts as legitimate law enforcement techniques. As such, their impact upon plaintiffs rights were minimal and defendants could reasonably and in good faith believe that their conduct was legal.

Specifically, the penetration of plaintiffs' organizations by law enforcement agents, whether covert or overt, does not violate any constitutionally protected right. See Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144 (D.C.D.C. 1976). See also Lewis v. United States, 385 U.S. 206 (1966); Hoffa v. United States, 385 U.S. 293 (1966).

Likewise, the intelligence gathering operations of the District of Columbia defendants, absent an existent or imminently threatened governmental sanction, did not inhibit plaintiffs' First Amendment rights. Finley v. Hampton, 154 U.S. App. D.C. 50 (1972), 473 F. 2d 180; Laird v. Tatum, 408 U.S. 1 (1972). Examples of the type or degree of actions or sanctions that would give rise to a claim appear in N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (contempt citation); Dombroski v. Pfister, 380 U.S. 479 (1965) (criminal prosecution); and National Student Assoc. v. Hershey, 134 U.S. App. D.C. 56, 412 F. 2d 1103 (1969) (threat of conscription). Plaintiffs' evidence against the District of Columbia defendants substantiated no similar threat or action by these defendants. Plaintiffs' claims then, are that the actions of these defendants subjected them to a chill on the exercise of their First Amendment rights. As stated in Laird v. Tatum, supra, at pages 13-14:

> "Allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm."

As such, the intelligence gathering operation of the District of Columbia defendants did not infringe upon plaintiffs' rights in an impermissible manner and these defendants could reasonably and in good faith believe that their conduct was lawful.

Likewise, the electronic surveillance operations conducted by these defendants did not give rise to a cause of action under 18 U.S.C. Section 2520 or D.C. Code, Section 23-554. Under both of these provisions, it is not unlawful to intercept wire or oral communications where one of the parties to the conversation has given prior consent. See 18 U.S.C.§2511 (2) (c); D.C. Code, Section 23-542 (b)(2). See also United States v. Bryant, 142 U.S. App. D.C. 132, 438 F. 2d 642 (1971); Lopez v. United States, 373 U.S. 427 (1963); United States v. White, 401 U.S. 745 (1971).

In this regard, microphones were installed in an informant's apartment with her knowledge and permission, thus bringing the circumstances of the electronic surveillance within the one party consent provisions of both local and federal law. Further, plaintiffs have conceded that they were unable to cite any case law holding that the surveillance was illegal when the consenting party was absent. Under these circumstances, plaintiffs can hardly argue that the defendants lacked a good faith and reasonable belief that their conduct was lawful.

Nor does the exchange of information between the District of Columbia defendants and the federal defendants give rise to a constitutional violation. Such an exchange is a legitimate law enforcement function. Philadelphia Yrly. Meet. Rel. Soc. of Friends v. Tate, Supra, 519 F. 2d 1335 (3rd Cir. 1975).

I.H. STATUTE OF LIMITATIONS

Plaintiffs' claims were barred by the three-year limitation period. This lawsuit was filed on July 16, 1976, more than three years after any of the acts were committed. To suspend the running of the statute, plaintiffs must show fraudulent concealment of material facts on the part of the defendants and that, in the exercise of due diligence by the plaintiffs, they were unable to discover sufficient facts to maintain the action or facts sufficient to place them on notice that they had a claim. Smith v. Nixon, 196 U.S. App. D.C. 276, 606 F. 2d 1183 (1979), Fitzgerald v. Seamans, 180 U.S. App. D.C. 75, 553 F. 2d 220 (1977).

The fact that the D.C. defendants were involved in intelligence activities does not in and of itself support a finding of fraudulent or deliberate concealment. Both Smith v. Nixon, supra and Fitzgerald v. Seamans, supra recognize that additional alternative acts are needed to provide the necessary aggravation. See Smith v. Nixon, supra, n. 44, page 1191. The only affirmative act taken by the D.C. defendents was the purging of outdated files begun in 1974 after the intelligence Division had been reorganized. While plaintiffs ascribe an ulterior motive to this conduct, the only evidence bearing on the issue was that the purging was done for routine administrative reasons, i.e., the information was useless. There was no evidence that it was done to conceal or destroy evidence. Nor was there any evidence that it was done subsequent to any inquiries about possible police misconduct. In light of the total absence of evidence to the contrary, the jury could not properly infer that the purging constituted fraudulent or deliberate concealment. See Vick

v. Texas Employment Commission, 514 F. 2d 734 (C.A. Tex. 1975). Accordingly, absent any fraudulent or deliberate concealment, plaintiffs' claims must be dismissed as untimely filed.

Assuming arguendo fraudulent concealment, plaintiffs' claims should be barred because of the total lack of any effort to gather information to support their claims. The plaintiffs testified that during the period relevant to this action they believed they were the object of law enforcement interest. Evidence was adduced as to the removal of large quantities of documents from 1029 Vermont Avenue during the period 1969 through 1971. Several of the plaintiffs, notably Sam Abbott and Reginald Booker, knew that Harold Bynum was an undercover police officer as early as 1971. Possessing these facts as well as their other suspicions, plaintiffs nevertheless made no inquiries or attempts to obtain any other informaion against the M.P.D. defendants until after the case had been filed. As such they can hardly be found to have exercised due diligence.

I.I. RESPONDEAT SUPERIOR AND CONSTITUTIONAL TORTS

The District of Columbia cannot be held liable under the theory of respondeat superior upon the evidence adduced by plaintiffs in this suit. Before liability may be imposed plaintiffs must prove that the injuries inflicted were the result of governmental policy or custom. Monel v. N.Y.C. Department of Social Services, 436 U.S. 658 (1978). Mere employment of a tortfessor is not a sufficient basis to impose liability, id, at pages 691 - 695. As stated by that Court

> "...it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983."

Here, the official policy is embodied in the Metropolitan Police Department General Order 7-G-4 (a) which sets forth the mission and function of the Intelligence Division. Since intelligence gathering operations are recognized as a legitimate law enforcement functions, the policy of the M.P.D. in and of itself must, as a matter of law be considered lawful and legitimate. See Berlin Democratic Club v. Rumsfield, 410 F. Supp. 144 (D.C.D.C. 1976); Laird v. Tatum, 408 U.S. 1 (1973). Thus, the District of Columbia cannot be held liable in the case at bar for any constitutional torts alleged by plaintiffs.

I.J. PUNITIVE DAMAGES

The assessment of punitive damages against defendants Wilson and Herlihy was improper since it was not supported by the evidence in this case. Punitive damages are awarded to punish and deter outrageous conduct and are proper only where a defendant's conduct contains elements of intentional wrongdoing or conscious disregard for plaintiff's rights. Nader v. Allegheny Airlines, Inc., 168 U.S. App. D.C. 255, 512 F. 2d 527, 549-50 (1975), rev'd on other grounds, 426 U.S. 290 (1976); Knippen v. Ford Motor Co., 178 U.S. App. D.C. 277, 546 F. 2d 993 (1976). While actual malice is not required, the defendant must act with such conscious and deliberate disregard of the consequences of his actions to others that his conduct is wanton. W. Prosser, Law of Torts, Section 2, at 9-10 (1971). In this regard gross negligence will not support punitive damages since it lacks the essential element of conscious indifference to consequences. Nader, supra, 168 U.S. App. D.C., at 237.

Where punitive damages are requested, it is relevant and proper to offer evidence of a defendants worth to help the jury in assessing a proper award. See Levine v. Mills, 114 A. 2d 546, 549 (D.C. Mun. App. 1955), affirmed in relevant part on other grounds in Mills v. Levine, 233 F. 2d 16, 98 U.S. App. D.C. 137 (1956). Without such evidence the jury can only speculate as to the amount of punitive damage necessary to effectively punish the defendant and deter similar future conduct. Plaintiffs, here offered no such evidence.

Applying these principles to this case, the evidence established that Jerry Wilson was Chief of Police and Thomas Herlihy the Inspector in the Intelligence Division during the relevant period. No evidence was adduced with respect to the personal role either defendant had in any

of the acts which gave rise to the suit. Their roles were largely supervisory and as such had little contact with the day to day activities of the officers under their command. As demonstrated in Part I.A. above, plaintiffs failed to produce sufficient evidence against the District defedants to even establish liability, let alone punitive damages. Plaintiffs clearly offered no evidence showing any malice or ill will towards plaintiffs by defendants Wilson and Herlihy. Accordingly, the award of punitive damages against them should be vacated.

II

The verdict returned by the jury were inconsistent and imcompatible on their face.

It has long been held in this juridiction that inconsistent and incompatible verdicts are defective as a matter of law. The case of Stivers v. George Washington University, 320 F.2d 751, 116 U.S. App. D.C. 29 (1963), is instructive on this point. In the Stivers case the jury returned the verdict in favor of a physician employed by a hospital, but against the hospital itself. The District Court granted the hospital's motion for judgment notwithstanding the verdict and plaintiff appealed. In affirming the trial court's grant of the defendant's J.N.O.V. motion, the court of appeals stated (116 US. App. D.C. at 31):

> "The hospital can be held liable in tort only derivately by virtue of the acts or omissions of its servants. Therefore, the two verdicts returned by the jury were inconsistent and incompatible on their face because the hospital could not be liable if its servant was not" [Footnote omitted]

As will appear more fully below, the verdict returned in the case at bar was inconsistent and incompatible in many respects each of which requires, at the very least, the granting of a new trial.

IIA.

Inconsistencies as to Conspiracy, Statute of Limitations and Immunity

There were findings of conspiracy and applicability of the statute of limitations and immunity defenses as to some plaintiffs but not all, and as to some defendants, but not all, with no corresponding distinctions in the evidence.

With respect to plaintiffs' claims of conspiracy the jury's verdicts were patently inconsistent. For example, the jury found that some defendants were liable because of their

involvement in the M.P.D. conspiracy. However, the jury with no rational basis in the evidence, made this finding as to some plaintiffs, but not others, and as to some defendants, but not others.

A second type of inconsistency in the jury's verdict was the finding of immunity with respect to some defendants as against some plaintiffs, inexplicably coupled with a finding of immunity for some defendants for the same activities with regard to other plaintiffs. Once again, there was no basis in the evidence for this distinction.

Finally, the jury's verdicts with respect to the application of the statute of limitations were inconsistent in that the jury barred the claims of some plaintiffs, based on the statute of limitations, but allowed the claims of other plaintiffs. The jury made these inconsistent findings inspite of the fact that the evidence in this regard did not distinguish between these plaintiffs. Given these irreconcilable inconsistencies in the jury verdicts, defendants, at the very least, should receive a new trial since it is evident that the jury did not understand the court's instructions.

IIB.

Multiple Compensation to Each Plaintiff

The verdict multiplies compensation to each plaintiff for each specific injury by as much as a factor of 13, the number of defendants found liable on the verdict form. It is axiomate in the law that a plaintiff is entitled to one compensation for the injury sustained as the result of defendants conduct. Illinois Central Railroad Co. v. Crail, 281 U.S. 57 (1930). Accordingly, a verdict to compensate a plaintiff for his injury should not be directed toward assessing a specific amount against each defendant but rather it should award one amount to plaintiff to compensate for that injury. See

Brightheart v. McCoy, 136 U.S. App. D.C. 400, 420 F.2d 242 (1969).

In the case at bar, the jury returned separate amounts of damages against each defendant who was liable. Since there were 13 defendants found liable,the jury verdict obviously compensated a plaintiff far beyond the damage actually suffered. In fact, given the enormity of the verdict, it is evident that the jury award bears no relationship to the damage suffered

IIC.

Separate and Higher Damages Against the District of Columbia

Although the District of Columbia is merely the employer of the individual defendants and can only act through its employees and not separately from them, the jury awarded separate and higher damages against the District in addition to the awards against individual District employees. Such a disparity reflects not only the fact of double recovery but also allows a greater award against the District of Columbia as the principle than against the individual agent. Since the District, acting through its agents (the only way it can act), cannot possibly damage a plaintiff more than its agents, a jury verdict which gives a greater award against the District than against its agents is clearly erroneous and must be vacated. Stivers v. George Washington University, supra

IID.

Amount of Awards Balanced Against Evidence

Although, the vast majority of the evidence at trial was presented against the federal defendants, the verdict awards almost two-thirds of the total damages against the District of Columbia defendants. Moreover, the evidence against the federal deffendants was more damaging and specific than that against the District of Columbia defendants. In fact, in re-

gard to some of the plaintiffs, at best, the Districts' only connection was an alleged conspiracy with the federal defendants. Under these circumstances it is clear that the jury awards do not reflect the conduct of the defendants but is rather, in factor of the number of District of Columbia defendants, and the apparent fact that the District of Columbia was the only institutional defendant. Such awards bear no relationship to the conduct of the defendants and the injuries to the plaintiff. As such they are clearly erroneous.

III

The Jury Verdict Form

The jury verdict for ~~un~~employed by the Court over defendants objection, permitted the jury to make inconsistent findings and to compensate each plaintiff more than one time for a particular injury with the results indicated in part numbered II above. The central problem in the jury verdict form, as reflected in the verdict itself, is that it directs the jury to award specific and separate damage amounts against individual defendants, including the District of Columbia as the employer of those defendants, rather than directing an award of damages to each plaintiff to compensate for specific injuries. Compensation for specific injuries is the only basis for compensatory damages. See Brightwood, supra. The jury verdict form used herein allowed a verdict which multiplies the compensation to each plaintiff for each specific injury by a factor of as much as 13, the number of defendant found liable. It is clear that the jury's award resulted in an amount totally out of proportion to the injury sustained because the original amount was multiplied and in some cases increased as the jury went down the list of defendants. Unquestionably such an award is improper, excessive and should be vacated.

IV

The District defendants were entitled to a mistrial based on the unfair advantage resulting from the unauthorized and improper contact between a discharged juror and plaintiffs agents while trial was still in session.

Subsequent to closing arguments it was brought to the attention of the court that Ms. Pilsbury, one of plaintiffs' attorneys, had contacted an excused juror through an agent Ms. Pike, after the evidence had closed but prior to closing arguments. This contact was clearly inviolation of local Rule 1-28. In the conversation with Ms. Pike on December 14, 1981, the juror related her impressions on the case. Briefly, that juror stated that the jury was overwhelmed by the facts which had been adduced that; there was some confusion that plaintiff's could still accomplish their goals despite FBI interference; that they were unsure if plaintiffs had been harmed; that the statute of limitation was a difficult issue and that there was fear or reluctance about going against the FBI.

In her closing argument, Ms. Pilsbury addressed the very issues raised by the juror. It is immaterial whether the emphasis was conscious since knowledge of where the jury was focusing could not be overlooked by counsel in closing argument. It is evident that this knowledge gave plaintiffs an unfair advantage since they would, and did, buttress the weak points in their case during closing argument. Such tactics are particularly ~~gregarious~~ egregious since there is no way that the unfair advantage to plaintiffs can be neutralized by the court. Under these circumstances, defendants were entitled to a mistrial, with costs of trial and retrial assessed against plaintiffs. Given, the present status of the case, a new trial would be appropriate, if any defendants do not receive a judgment notwithstanding the verdict on the other grounds stated in this motion.

V.

The jury verdict in this case bears no reasonable relationship to the injuries proved and accordingly is excessive as a matter of law.

The jury verdict in this case bears no reasonable relationship to the injuries proved and accordingly is excessive as a matter of law. When the amount of a judgment is "totally out or proportion to any harm that has been suffered" the judgment must be vacated. See Dellums v. Powell, 566 F.2d 167, 196 (D.C. Cir. 1977). As pointed out in 5 Am. Jur. 2d., Appeal and Error, §836 at 279:

> ***[I]t is apparent from the cases that the appellate courts in most jurisdictions do rather freely review the amount of damages awarded, and that this practice represents something of a modern trend. So, while the mere fact that the amount of the verdict is "ample" or"liberal" is no sufficient reason for interference by the appellate court, where it clearly appears from uncontradicted evidence that the amount awarded by the verdict bears no reasonable relation to the loss to be compensated for, or where it is obvious from the facts that the amount of damages awarded by the jury is highly conjectural and imaginative, a judgment based on that verdict cannot be sustained on appeal. [Footnotes omitted; emphasis added]

In West v. Jutras, 456 F.2d 1222, 1226 (2nd Cir., 1972), it was observed that the factors considered by courts, in reviewing a verdict for excessiveness are:

> ***(1) The amount of medical and other expenses occasioned by the injury, (2) the extent of the plaintiff's pain and suffering, (3) the loss of past and future earnings, and (4) the curtailment of plaintiff's normal activities.

Here, of course, there were no out of pocket expenses or loss of past or future earnings, or pain. The only damages would be those associated with the mental anguish suffered by plaintiffs based on an alleged deprivation of constitutional rights.

Under these circumstances the observations made by the court in Dellums, supra at page 195-196 is particularly useful. There is was noted:

> That the loss of an opportunity to demonstrate constitutes loss of First Amendment rights "in their most pristine and classic form" does not mean, however, that monetary recompense should be extravagant. The award must be proportional to the loss involved insofar as it seeks to compensate intangible injuries. The jury cannot simply be set loose to work its discretion informed only by platitudes about priceless rights. [Footnotes omitted]

There, the court concluded that an award of $7,500.00 to each class member who had been arrested at a demonstration was totally out of proportion to any harm suffered.

Here, on the other hand, five plaintiffs were awarded $79,375.00 each in total compensatory damages and three were awarded $66,687.50 each in total compensatory damages. None of these plaintiffs were arrested. Most were unaware of the injury until long after the acts had been committed. Nor can it be said that the defendant's conduct substantially thwarted plaintiffs activities. In sum, the injuries suffered by plaintiffs were insubstantial, unapparent, and subjective, resulting from largely technical violations of the law. Under these circumstances the damages awarded are grossly disproportinate to any possible harm suffered by the plaintiffs and defendants are entitled to a vacation of the judgment.

CONCLUSION

Based on the foregoing, the District of Columbia defendants respectfully move this Court to set aside the verdict returned by the jury in this cause on December 23, 1981, and notwithstanding the same, to enter judgment in their favor. In the alternative, the District of Columbia defendants move this Court to grant them a new trial or to grant a substantial remittitur.

Judith W. Rogers (mw)

JUDITH W. ROGERS
Corporation Counsel, D.C.

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

MOTION BY DEFENDANTS BRENNAN, MOORE, JONES, PANGBURN, AND GRIMALDI FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR NEW TRIAL

Defendants Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould W. Pangburn, and Gerald T. Grimaldi, through undersigned counsel and pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, move this Honorable Court to set aside the verdict and judgment entered on December 23, 1981, and to enter judgment in favor of these defendants in accordance with the motion for directed verdict made by the defendants at the close of plaintiffs' case in chief and renewed at the close of all the testimony.

In the alternative, these defendants move this Honorable Court to set aside the verdict and the judgment entered thereon and grant defendants a new trial.

In support of this motion the defendants rely upon the record of this action and the attached memorandum of points and authorities.

Respectfully, submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
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	)	76-1326
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	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION BY DEFENDANTS BRENNAN, MOORE, JONES, PANGBURN, AND GRIMALDI FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Following trial of this action, the jury returned a verdict in favor of eight of the plaintiffs and awarded damages in the aggregate amount of $711,937.50. The total awards against the five federal defendants were as follows: $75,000 against defendant Charles D. Brennan, $60,000 against defendant George C. Moore, $45,000 against defendant Courtland J. Jones, $45,000 against defendant Gerould W. Pangburn, and $37,500 against defendant Gerald T. Grimaldi. The jury found that each of these defendants had, by individual action as well as by conspiratorial action, injured each of the eight plaintiffs, and the jury found each defendant equally liable to each plaintiff. Two-thirds of each award was designated by the jury as compensatory damages and one third was designated as punitive damages.[1/]

1/ The award for each plaintiff as against each of the federal defendants was as follows:

	Compensatory Damages	Punitive Damages	Total
Brennan	$6250.00	$3125.00	$9375.00
Moore	$5000.00	$2500.00	$7500.00
Jones	$3750.00	$1875.00	$5625.00
Grimaldi	$3125.00	$1562.50	$4687.00
Pangburn	$3750.00	$1875.00	$5625.00

Following plaintiffs presentation of their evidence, the federal defendants moved for directed verdict on grounds that the facts presented and the inferences that could be drawn from such facts so strongly weighed in favor of the defendants that a reasonable person could not come to a conclusion in favor of the plaintiffs. The Court denied the motion for directed verdict, which was renewed at the close of the evidence, and the federal defendants now move for judgment notwithstanding the verdict on the specific grounds stated in support of the motion for directed verdict:

1. Plaintiffs failed to present evidence of fraudulent or deliberate concealment and of due diligence sufficient to entitle them to avoid barring of the action by the statute of limitations;

2. Plaintiffs failed to present sufficient evidence that the federal defendants joined among themselves in a conspiracy to violate plaintiffs' First Amendment rights or joined in a conspiracy with officers of the Metropolitan Police Department to violate plaintiffs' First Amendment rights;

3. Plaintiffs failed to present sufficient evidence that the federal defendants had personally committed acts which injured plaintiffs in the exercise of their rights; and

4. Defendant Jones is entitled to judgment on grounds that plaintiffs failed to prosecute diligently the action as against him and unfairly prejudiced him by the extraordinarily late service of the Summons and Complaint.

In the alternative to judgment notwithstanding the verdict, the federal defendants are entitled to a new trial on the following grounds:

1. Defendants were prejudiced by the misconduct of counsel for plaintiffs;

2. The Court permitted immaterial but prejudicial matter to be introduced into evidence;

3. The jury instructions regarding conspiracy and the statute of limitations were erroneous;

4. The Court failed to instruct the jury that the United States would not assume payment of any damage award made against the federal defendants.

5. The verdict form was improper in that the issue of statute of limitations was not placed as the first matter to be considered by the jury and the issue of good faith immunity was inadequately described;

6. The verdict was contrary to the weight of the evidence;

7. The verdict was excessive.

I. Federal Defendants Are Entitled To Judgment Notwithstanding The Verdict

Having moved for a directed verdict at the close of the plaintiffs' case and at the close of all the evidence, the federal defendants are enabled to move to set aside the verdict and judgment entered in favor of plaintiffs and to have judgment entered in their favor. Rule 50(b), Federal Rules of Civil Procedure. The standard to be applied by the Court in ruling on such a motion was stated in Vander Zee v. Karabatsos, 589 F.2d 723, 726 (D.C. Cir. 1978). "A motion for judgment notwithstanding the verdict should not be granted unless the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." That standard is satisfied in this action.

A. Plaintiffs Failed To Prove That the Action Is Not Barred By the Statute Of Limitations

Plaintiffs proved no act which occurred after July 16, 1973. The limitations period is three years, and the action was filed July 16, 1976. Accordingly, plaintiffs had the affirmative obligation of proving fraudulent or deliberate concealment to avoid the bar imposed by the statute of limitations. See Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974), affirmed, 553 F.2d 220 (D.C. Cir. 1977). Plaintiffs must have shown either

that defendants had an affirmative duty to disclose information and failed to do so or that defendants took affirmative action to conceal material facts. Silence does not constitute fraudulent concealment. Smith v. Nixon, 606 F.2d 1183 (D.C. Cir. 1979); General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3, 8 (D.D.C. 1979).

In addition, plaintiffs had the burden of proving that they exercised "due diligence" in attending to their own affairs and in seeking facts or advice pertinent to their potential cause of action. Fitzgerald v. Seamans, supra.

Plaintiffs offered no evidence (1) that each federal defendant had an affirmative duty to disclose information to plaintiffs, (2) that each federal defendant committed a deliberate or affirmative act of concealment, or (3) that each plaintiff exercised "due diligence."

On the other hand, the evidence showed affirmatively that prior to July 16, 1973, plaintiffs had actual knowledge or had beliefs which were sufficient to them to warrant bringing this action, and there was information available which plaintiff should have been aware of had they been exercising due diligence:[2/]

1. COINTELPRO - New Left and COINTELPRO - Black Nationalist Hate Groups were publicly disclosed as a result of the burglary of an FBI Office in Media, Pennsylvania, in March, 1971 (Testimony of Brennan);

2/ Plaintiffs acknowledged that they were aware of certain activities well before July 16, 1973. Plaintiff's counsel argued in closing that plaintiffs were not aware of the purpose of this activity until publication of the Church Committee Report in April, 1976. No plaintiff testified, however, that he or she was aware of or had read the Church Committee Report prior to bringing this action. In other words, the evidence shows, contrary to counsel's statements, that the Church Committee Report was irrelevant to the issue of the statute of limitations.

2. Articles published by and about ex-Special Agent Robert Wall in early 1972 described COINTELPRO - New Left and also described, albeit somewhat inaccurately, matters relating to the FBI's response under COINTELPRO to the so-called head-tax demand made by the Black United Front to the New Mobilization Committee in 1969. (Federal Defendants' Exhibits 18, 19, 20);

3. A civil action brought in the Southern District of New York in 1970 resulted in disclosures that agents of the FBI were investigating the New Mobilization Committee in Washington, D.C. (Federal Defendants' Exhibit 25);

4. Plaintiffs Booker, Pollock, Abbott, Waskow, Bloom, Hobson, and the Washington Peace Center testified that prior to July 16, 1973, they were aware of or had participated in events and they had strong beliefs which actually led them to commence this civil action.

The evidence established that plaintiffs did not discover certain matters until after this action was commenced. But this is the function of civil discovery and is a phenomenon recognized in Fitzgerald v. Seamans, supra. The issue is when did plaintiffs have the knowledge and information which led them to commence this action, and the evidence establishes they had such knowledge and facts prior to July 16, 1973.

B. Plaintiffs Failed To Prove Conspiracy Among The Federal Defendants Or Between The Federal Defendants And The District Columbia Defendants

A civil conspiracy is a combination of two or more persons to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose. Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979). For the conspiracy to exist, there must be some express or implied agreement among the conspirators in the object of the conspiracy. Lamont v. Haig, 590 F.2d 1124 (D.C. Cir. 1978). It is required that there be some bond among the conspirators, beyond mere association or common employment, constituting agreement, unity of purpose, or common design. Tyrrell v. Taylor, 394 F. Supp. 9, 15 (E.D. Pa. 1975), modified 535 F.2d 823 (3rd Cir. 1976). Finally, the conspiracy itself

is not actionable. There must have occurred an overt act in furtherance of the object of the conspiracy which injured the plaintiff in his person or property or deprived the plaintiff of having and exercising any right or privilege of a citizen of the United States. Hampton v. Hanrahan, supra; Wu v. Keeney, 384 F. Supp. 1161 (D.D.C. 1974).

In addition, there is no conspiracy where the act complained of is essentially the act of a single entity. Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). Thus, a business decision by executives of one firm is not a conspiracy, Dombrowski, supra, nor is the joint action of administrators and faculty of a single university a conspiracy, Zentgraf v. Texas A & M University, 492 F. Supp 265 (S.D. Texas 1980). A determination of institutional policy by the executives is also not a conspiracy, Johnson v. Brelje, 482 F. Supp. 125 (N.D. Ill. 1979), and it naturally follows that acts of individual employees are not conspiratorial if they are not of a personal nature and only had connection to the corporate - employer's affairs, Sciolino v. Marine Midland Bank - Western, 463 F. Supp. 128, 134 (W.D.N.Y. 1978). Finally, a person who was merely carrying out instructions of superior officers cannot be found to have participated in a conspiracy. Boles v. Fox, 403 F. Supp. 253 (E.D. Tenn. 1975).

In this action, plaintiffs have also asserted that they have a claim under the conspiracy provisions of the Civil Rights Act, 42 U.S.C. §1985(3). To establish such a claim plaintiffs must prove that the motivation for the conspirators' actions was "some racial, or perhaps otherwise class-based, invidiously discriminatory animus." Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971). Such animus, as a state of mind, implies malice, ill-will, or hatred against a group or class which is intense enough to invest an individual's actions with an improper motive. This test is not met by showing that an individual lacks affection or even harbors some resentment or dislike for the class. The animus must be so strong as to constitute a significant or deciding element in the conception and execution of the act complained of. See Robinson v. McCorkle, 462 F.2d 111, 113 (3rd Cir. 1972).

The "class" contemplated by the statute must be possessed of discrete, insular, and immutable characteristics comparable to those characterizing classes such as race, national origin, and sex. Savina v. Gebhart, 497 F. Supp. 65 (D. Md. 1980). Such a "class" does not include persons engaged in a single common kind of action; otherwise, the statute would be converted into a general tort law applying to any allegedly wrongful conduct directed at more than one person. Silkwood v. Kerr-McGee Corp., 460 F. Supp. 399 (D. Colo. 1978), aff'd 637 F.2d 743 (10th Cir. 1980). Consequently, a class described as consisting of all persons who disagree with the political and economic policies of the government is too vague to satisfy the requirement of the statute. See Bond v. County of Delaware, 368 F. Supp. 618 (E.D. Pa. 1973); see also Voytko v. Ramada Inn of Atlantic City, 445 F. Supp. 315, 324 n.13 (D.N.J. 1978).

In this action, plaintiffs attempted to establish that the federal defendants engaged in a conspiracy whose purpose and object was defined by the Federal Bureau of Investigation's counterintelligence programs directed at "Black Nationalist Hate Groups" and at the "New Left." (Plaintiffs' Exhibits 1, 2, and 3). The purpose of these programs, each of which was approved by the Director of the Federal Bureau of Investigation, was to attempt to counteract the growing threat of violence being caused in the late 1960's by such groups as the Black Panther Party and the Students for a Democratic Society. (Testimony of Moore and Brennan.) Plaintiffs attempted to proved that activities pursuant to these programs unconstitutionally interfered with their First Amendment rights of association.

Applying the standards adumbrated above to the evidence demonstrates that federal defendants did not join in a civil conspiracy to violate plaintiffs' constitutional rights.

The evidence showed that the only common threads tying the federal defendants together was their employment with the Federal Bureau of Investigation and their obligation to carry out their respective duties established by their superiors, including the Director of the FBI and the Attorney General. There was no evidence of an express or implied agreement among the five federal defendants to do an unlawful act or to carry out an unlawful purpose.

Defendant Charles D. Brennan was from 1966 to 1970 the Chief of the Internal Security Section in FBI Headquarters. There were eight supervisory levels above him in the FBI's chain of command. Defendant Brennan had general responsibility for administering COINTELPRO-New Left, but he could not act as the final approving authority on any proposal under the program. The evidence showed that following creation of COINTELRPO-New Left he was personally involved in only one of the program activities complained of by plaintiffs. He forwarded to his superiors a recommendation from the Bureau's Washington Field Office to publish and distribute a newsletter called The Rational Observer. (Plaintiffs' Exhibit 29). From the Summer of 1970 to September, 1971, defendant Brennan was Assistant Director in charge of the Domestic Intelligence Division. During this period the counterintelligence programs were terminated. (Plaintiffs' Exhibit 36.) While Assistant Director, defendant Brennan was involved in only one COINTELPRO activity complained of by plaintiffs, the reprinting and distribution of a New York Times article. The proposal was approved by the Director of the FBI. (Plaintiffs' Exhibit 7.)

Defendant George C. Moore was Chief of the Racial Intelligence Section in FBI Headquarters from 1967 until his retirement in 1976. As with defendant Brennan, there were eight supervisory levels above him in FBI Headquarters. The Counterintelligence Program - Black Nationalist Hate Groups had been approved by the

Director before defendant Moore was assigned to the section responsible for the program. Although he had general responsibility for the program, he could not act as the final approving authority on any proposal. The only activity under the program in which he was personally involved and about which plaintiffs suggested injury was the recommendation to his supervisors that certain information regarding the Poor People's Campaign be provided to the press. (Plaintiffs' Exhibits 10, 11, and 12.) In this matter he was following procedures established by his superiors and the recommendation was subject to the approval of his supervisors. In any event, there was no evidence to show that the information was published, and David Eaton, the only plaintiff claiming a connection with the Poor Peoples' Campaign, offered no testimony that his activities in the Campaign were impaired or impeded in any way.

Defendant Courtland J. Jones was the Security Coordinating Supervisor at the FBI's Washington Field Office from 1964 to 1974. In that capacity he supervised approximately 200 agents distributed among the nine squads responsible for all foreign and domestic intelligence activity in that office. The counterintelligence programs having been imposed on the office by FBI Headquarters, defendant Jones had general supervisory responsibilities with respect to the programs. As a consequence of his responsibilities, defendant Jones read and initialed some of the correspondence relating to counterintelligence coming into or going out of the office. (Plaintiffs' Exhibits 20, 21, 27.) He did not, however, originate proposals under the programs, nor could he act as final approving authority on any proposal under the program.

Defendant Gerald T. Grimaldi was a Special Agent in the Washington Field Office. In addition to his other duties, he was from May, 1968, to approximately April, 1970, designated by

his squad supervisor to be the COINTELPRO- New Left Coordinator. This was a responsibility required by the terms of the program to be assigned to an agent in each participating office. Defendant Grimaldi's principal responsibility in this connection was to prepare the correspondence to Headquarters relating to COINTELPRO- New Left. His role in many of the activities was essentially that of an amanuensis, preparing memoranda regarding proposals devised by other agents pursuant to the program or reporting results of activity implemented by other agents. (Plaintiffs' Exhibits 13, 15.) The only activity under COINTELPRO complained of by any plaintiff in which defendant Grimaldi had personal involvement was the preparation and distribution of The Rational Observer, a newsletter published anonymously and distributed on the campus of American University in the Fall of 1969. (Plaintiffs' Exhibit 27, 28, 29.)

Defendant Gerould W. Pungburn was a Special Agent in the Washington Field Office assigned from early 1968 to April, 1972, to investigate black groups. From April, 1972, to October, 1974, he was supervisor of the squad responsible for extremist and racial matters. There was no evidence to show that he was in any way involved in any counterintelligence program activities. The only activity by defendant Pangburn affecting any plaintiff was a brief, chance encounter with plaintiff Reginald Booker in April, 1972, at an intersection near the Washington Field Office. In addition, defendant Pangburn received some information from informants who attended meetings of the Black United Front. In short, there was no evidence from which a reasonable person could infer that defendant Pangburn was a participant in a conspiracy or had personally engaged in wrongful conduct.

The evidence thus does not show a conspiracy among the five federal defendants. Rather, the evidence shows only that four of them were carrying out their responsibilities within the FBI in accordance with policies and programs instituted by their

superiors and that the fifth, defendant Pangburn, was not involved in any way in activity under those programs. This is not conspiracy:

> [T]here is . . . a legal obligation on the part of the employees of the Justice Department to carry out the directives of their superiors when those superiors assure them their actions are legal. I think it would be unrealistic to suppose that employees of the Justice Department should be forced to choose between termination of employment for refusal to follow directives and maintenance of a correct view of constitutional duties in opposition to the incorrect view of superiors. Civil disobedience within the Department is highly unlikely and we may doubt whether it should be encouraged.

Zweibon v. Mitchell, 516 F.2d 594, 675, 678-79, fn. 12 (D.C. Cir. 1975) (Bazelon, J., concurring).

Finally, plaintiffs offered no evidence from which a reasonable person could infer that there existed a conspiracy between the federal defendants and any of the District of Columbia defendants. Witnesses testified that information was exchanged between the Metropolitan Police Department and the Federal Bureau of Investigation. (Testimony of Christopher Scrapper and Blanco Drummond.) Defendant Jerry Wilson also testified that there was a federal official responsible for coordinating the federal and local law enforcement activities during the large demonstrations. But this sort of cooperation is proper and is not a conspiracy. United States v. Simon, 409 F.2d 474 (7th Cir. 1969); United States v. Satterfield, 410 F.2d 1351, 1354 (7th Cir. 1969). None of the elements of conspiracy were proven to any degree.

C. Plaintiffs Failed to Prove That The Federal Defendants Personally Committed Acts Injuring Plaintiffs

Much of plaintiffs' evidence pertained to activity in which none of the federal defendants were personally involved. That activity in which one or more of the federal defendants was involved did not cause injury or was not activity for which they should be required to answer in damages.

The law is established that, absent some degree of direct responsibility, a federal official will not be held liable in damages for the wrongdoing of subordinates. The policy supporting this rule was enunciated by the Supreme Court in Robertson v. Sichel, 127 U.S. 507 (1888):

> [T]o permit recovery against the [superior] ... would be to establish a principle which would paralyze the public service. Competent persons could not be found to fill positions of the kind, if they knew they would be held liable for all the torts and wrongs committed by a large body of subordinates, in the discharge of duties which it would be utterly impossible for the superior officer to discharge in person.

127 U.S. at 515.

In a case involving two former Special Agents in Charge of the Denver, Colorado, Division of the Federal Bureau of Investigation, Kite v. Kelley, 546 F.2d 334 (10th Cir. 1976), the court upheld a directed verdict in favor of the defendants where the evidence failed to show that "any defendant instigated the investigation of plaintiff, directed its course, participated or acquiesced therein." 546 F.2d at 338. Citing Rizzo v. Goode, 423 U.S. 362 (1976), the court held that "before a superior may be held for acts of an inferior, the superior, expressly or otherwise, must have particpated or acquiesced in the constitutional deprivations of which complaint is made." 546 F.2d at 337.

Proof of personal participation to hold federal officers personally liable in damages has also been required by the courts in Black v. United States, 534 F.2d 524, 527-28 (2nd Cir. 1976); Lander v. Morton, 518 F.2d 1084, 1087 (D.C. Cir. 1976); Tucker v. Duke, 276 F.2d 499 (D.C. Cir. 1960); Jackson v. Wise, 385 F. Supp. 1159, 1163 (D. Utah 1974); and Byrd v. Warden, Federal Detention Headquarters, 376 F. Supp. 37, 39 (S.D.N.Y. 1974).

The activity about which plaintiffs presented evidence during trial was as follows:

1) distribution of anonymous leaflets purporting to attack persons or organizations;

2) publication of a newspaper known as The Rational Observer;

3) distribution of reprinted newspaper articles;

4) preparation of "news releases" to be given to newspaper reporters;

5) possible distribution of fictitious housing forms prior to demonstrations in January, 1969;

6) interference with demonstrators' radio communications network at the demonstration in January, 1969;

7) inclusion of plaintiffs' names in compilations known as the Security Index and the Agitator Index;

8) overhearing of plaintiffs' conversations during electronic surveillances on the telephones of the Black Panther Party and the Peoples Coalition for Peace and Justice; and

9) interviews or conversations between FBI Agents and plaintiffs.

In connection with this activity plaintiffs did not contend that they were themselves deprived of the opportunity or the ability to speak, to write, or to assemble. Some plaintiffs, including plaintiffs Abbott, Booker, and Waskow

testified of no injury at all. Others, particularly plaintiff Bloom, contended that obstacles were placed in their way in gaining the assistance or attendance of others in connection with their plans for demonstrations.

Out of all the evidence presented by plaintiffs, only the following were shown to have been acts in which a defendant personally participated and by which a plaintiff testified he was affected:

1. Defendant Grimaldi prepared and distributed The Rational Observer. Defendants Jones and Brennan forwarded to their superiors the recommendation to distribute The Rational Observer but neither acted as the final approving authority.

Plaintiff Richard Pollock testified that after reading parts of The Rational Observer he failed to go to a few Student Mobilization Committee (SMC) meetings. This testimony was in stark contrast, however, to his testimony that at the same time he was actively and publicly engaged in encouraging students to participate in the Moratorium in October, 1969, he acted as a marshal in the Mobilization in November, 1969, and he was active in the SMC for the entire school year 1969 to 1970. Accordingly, his testimony that he was injured by The Rational Observer is entitled to no weight.

2. Defendant Brennan, while Assistant Director in charge of the Intelligence Division, forwarded to the Director a proposal to mail reprints of a New York Times article to selected persons. Following approval by the Director, plaintiffs Waskow, Bloom, and Abbott were apparently mailed copies of this article, but only plaintiff Bloom testified concerning it and he said it had no effect on him. No constitutional violation or injury is apparent from this activity. Cf. Paul v. Davis, 424 U.S. 693 (1976).

3. Defendant Moore forwarded to his superiors in FBI Headquarters recommendations that certain information concerning the Poor People's Campaign in 1968 be provided to the news media. No evidence was offered to show that the information was actually published. Moreover, the only plaintiff claiming to have been involved in the Poor People's Campaign, David Eaton, gave no testimony at all as to whether these activities were impaired or impeded.

4. Defendant Pangburn, along with Special Agent John T. Aldhizer, encountered plaintiff Reginald Booker at the intersection of 12th and Pennsylvania Avenue, N.W., on one occasion in April, 1972. Although defendant Pangburn and plaintiff Booker gave differing accounts of this event, no constitutional violation occurred under either account, and plaintiff Booker described no injury to himself or interference with his activities.

5. Defendants Moore and Brennan as section chiefs were, respectively, responsible for administering certain aspects of the Agitator Index and the Security Index. Certain of the plaintiffs were on one or the other of these indexes, though neither defendant Moore nor defendant Brennan was personally responsible for selecting or finally approving names for the indexes. The Agitator Index was for the purpose of identifying persons who might have been responsible for encouraging or promoting racial violence. The Security Index was for the purpose of identifying persons who might be subject to detention in case of extreme national emergency. Neither index implicated a constitutional violation. Lists maintained in confidence by the Department of Justice of persons believed to be particularly dangerous are not themselves unconstitutional where no actual deprivation or sanction occurs. See Joint Anti-Fascist Refugee Comm. v. McGrath, 342 U.S. 123, 183-84 (Jackson, J., concurring) (1951).

6. Defendants Jones, Brennan, and Moore forwarded to their superiors, and ultimately to the Attorney General, recommendations that electronic surveillances be placed on the telephones of the Black Panther Party and the Peoples Coalition for Peace and Justice. The Attorney General authorized these surveillances and certain of the plaintiffs were overheard on one or more occasions. Although such domestic intelligence electronic surveillances, conducted without judicial warrant, were later declared to be unconstitutional, United States v. United States District Court, 407 U.S. 297 (1972), these defendants should not be held liable in damages to the plaintiffs whose conversations were overheard. The defendants were acting strictly in accordance with procedures and standards established by the Attorney General and should not now be made to account in damages because the Attorney General was later found to have had an incorrect view of the constitutional requirements. See Zweibon v. Mitchell, 516 F.2d 594, 675, 678-79, fn. 12 (Bazelon, J., concurring) (D.C. Cir. 1975).

Plaintiff's have thus failed to prove any injury for which they are entitled to damages from the federal defendants.

D. Defendant Courtland J. Jones Is Entitled to Judgment In His Favor Because Of Plaintiffs' Failure To Prosecute

This action was commenced on July 16, 1976. By Amended Complaint filed December 7, 1977, Courtland J. Jones was added as a party defendant. Service of process was attempted in December, 1978, but defendant Jones was dismissed for insufficiency of service of process by Order of this Court dated November 9, 1979. Plaintiffs thereafter ignored defendant Jones until April, 1981, when he was served with a subpoena to testify as a witness by oral deposition. The deposition occurred in May, 1981, and then on June 21, 1981, forty days before termination of discovery, he was served with the Summons and Amended Complaint. Defendant Jones thereafter moved to

dismiss on grounds that, among other things, the plaintiffs had failed to prosecute the action as against him and that he had been unfairly prejudiced by plaintiffs' untimely service of process. The motion to dismiss was denied by Order dated October 29, 1981.

During pretrial conferences and the trial of this action plaintiffs frequently stated, and endeavored to prove, that defendant Jones played a leadership role in the intelligence activities of the FBI's Washington Field Office and was a key figure in the alleged conspiracy against the plaintiffs. He was apparently important enough to cause plaintiffs to continue the action as against him while voluntarily dismissing fifteen other defendants.

Believing defendant Jones to be critical to their case, plaintiffs contrived to wait until the last possible moment to serve process on him and thus deprive him of effective representation of counsel. Plaintiffs made no effort to explain why they could not have made timely service, and, in fact, they could not have offered a good faith explanation inasmuch as they had clearly known his place of residence since as early as December, 1978.

Because of plaintiffs' inaction, defendant Jones properly believed that they had abandoned the action as against him. Plaintiffs should not be permitted to benefit from their own extraordinary lack of diligence, particularly in a circumstance strongly hinting of bad faith.

Defendant Jones is entitled to judgment in his favor. See Anderson v. Air West, Inc., 542 F.2d 522 (9th Cir. 1976).

II. In The Alternative, Defendants Are Entitled To A New Trial

Whether the Court concludes that the federal defendants are, or are not, entitled to judgment notwithstanding the verdict, the Court is obligated to rule on the motion for new trial. Rule 50(b), Federal Rules of Civil Procedure. For the reasons set forth in part I, supra, and for the following reasons, the motion for new trial should be granted.

A. Defendants Were Prejudiced By Plaintiffs' Counsels' Wrongful Contact With An Excused Juror

On December 3, 1981, during trial of this action, the Court excused a juror for not arriving until after trial had resumed. During a subsequent chambers conference, with counsel present, the Court reprimanded the juror and then instructed her not to speak to any other juror or to anyone else about the case.

Following close of the evidence on December 14, 1981, attorney Mary Pike, who had entered her appearance for plaintiffs and who was acting in behalf of plaintiffs' lead trial counsel, contacted the excused juror and discussed the case with her. According to attorney Pike, she initiated the conversation by acknowledging to the juror that she understood the juror had been instructed not to talk to anyone and she then stated that therefore the juror did not have to talk to her if she did not want to.

As a result of the conversation, plaintiffs gained invaluable insight into the mind and attitude of this juror and, by implication, the minds of the other jurors. They learned, for example, that the jurors were having trouble remembering the testimony, that they were having trouble

understanding the statute of limitations, that they perceived the plaintiffs were able to carry out their activities despite their claims of injury, that the interference with radio communications in January, 1969, was thought to be a major point, and that the jury was having difficulty distinguishing the minor from the major issues.[3/] All of this was priceless information for use in organizing plaintiffs' final argument to the jury and clearly prejudiced the defendants by giving plaintiffs a substantial and unfair advantage.

Plaintiffs having violated the specific order of this Court that the juror should speak to no one about the case, having violated the rules of this Court regarding communications with jurors,[3a/] and having gained unfair and improper advantage, the federal defendants are entitled to a new trial.

B. Documents And Testimony Which Were Immaterial But Prejudicial Were Permitted To Be Introduced Into Evidence

Over the objection of counsel for federal defendants, testimony and exhibits which did not pertain to any defendant, but which could inflame or mislead the jury, were introduced into evidence. Among the most critical evidence in this regard was the following:

1. Plaintiffs' Exhibits 95, 96, 97, 98, 99, 100, 102, and 103 were extensive excerpts from the files maintained by the Federal Bureau of Investigation concerning the plaintiffs. Even though none of the federal defendants were directly involved in the investigation of any plaintiff, this material was admitted into evidence, thus permitting the jury to consider,

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3/ Although the matter cannot be stated with certainty, the comments of the excused juror suggest that the jurors were, contrary to the instructions of this Court, discussing the case before conclusion of the evidence. If true, this would be grounds for mistrial.

3a/ After the issue first arose, plaintiffs attempted to argue that the rule regulating communications with jurors does not apply to "excused" jurors. Inasmuch as the rule prohibits counsel from communicating with a juror without the Court's permission even after the jury is discharged, plaintiffs' position is clearly contrary to the sense and intent of the rule. Local Rule 1-28.

and potentially hold defendants liable for, investigative and other activity which the federal defendants would not have been involved in and would not have known about.

2. Plaintiffs' Exhibits 31 and 31A were COINTELPRO proposals devised in the FBI's New York office to attack the New Mobilization Committee. They were admitted into evidence even though none of the federal defendants ever saw them or knew about them. The jury could have improperly assigned responsibility for them to the defendants.

3. Plaintiffs' Exhibits 23, 24, and 25 pertained to a COINTELPRO proposal conceived in the New York office apparently to try to exacerbate differences between the Black United Front and the New Mobilization Committee which arose in the late Summer of 1969. The proposal was to distribute a leaflet which made a vicious and racist attack on the Rev. Douglas Moore, a leader in the Black United Front. The proposal was approved and implemented, but none of the federal defendants saw it or knew about it. The effect of the leaflet would clearly have been to inflame the passions of the jury against the defendants.

As argued in part I.C., supra, the federal defendants may properly be held accountable in damages only for activity in which they were personally involved. Admission into evidence of the documents described above permitted the jury to find defendants liable for activity in which they had no personal involvement.

C. The Jury Instructions Relating To Conspiracy And The Statute Of Limitations Were Erroneous

The jury instructions pertaining to the law of conspiracy were erroneous on two grounds: (1) The Court failed to instruct the jury that the conspirator, that is, the individual, must have been motivated by a "class-based, invidiously discriminatory animus." By being instructed that the conspiracy must have been so motivated, the jury could have believed that a particular defendant could have been a member of the conspiracy even though he did not have the requisite state of mind. Thus a defendant could have been found liable for acts of a conspiracy of which he should not properly have been found to be a member. See Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).

(2) The jury instructions incorrectly defined overt act. Under a civil conspiracy, the overt act which makes the conspiracy actionable must have caused actual injury to the person, property, or rights of the plaintiff. Fitzgerald v. Seamans, 384 F. Supp. 688 (D.D.C. 1974).

The jury instructions regarding fraudulent concealment were also erroneous on two grounds: (1) The Court failed to instruct the jury that mere silence by a defendant is not fraudulent or deliberate concealment. General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3, 8 (D.D.C. 1979).

(2) The Court instructed the jury that concealment for law enforcement purposes may be deemed to be fraudulent or deliberate concealment. This instruction was contrary to the principle that concealment by a third party may not be attributed to the defendant, Cato v. South Atlantic and Gulf Coast Dist. of Intern. Longshoremen's Ass'n 364 F. Supp. 489 (S.D. Tex. 1973), aff'd 485 F.2d 583 (5th Cir. 1973), and to the principle that the concealment must have been wrongful, General Aircraft Corp. v. Air America, Inc., 482 F. Supp. 3 (D.D.C. 1979).

These errors prejudiced the federal defendants.

D. The Court Failed To Instruct The Jury That The United States Would Not Assume Payment Of Any Damage Award Made Against The Federal Defendants

The federal defendants requested, but were denied, a jury instruction that the individual federal defendants would be required personally to pay any damage award and that the United States would not pay. The jury may therefore have assumed that the United States would undertake payment and thus may have imposed a higher award than if the instruction had been given. The federal defendants were prejudiced by the Court's failure to give the requested instruction.

E. The Verdict Form Was Inadequate

The verdict form prejudiced the federal defendants in two ways: (1) the issue of the statute of limitations should have been placed before the issues of injury and immunity; (2) the verdict form should have more fully described the concept of good faith immunity.

Under the verdict form composed by the Court, the jury did not deliberate the facts relating to the statute of limitations unless it had already decided that a defendant had injured a plaintiff and was not immune from liability. This order of deliberation was thus contrary to the principle that the merits of a claim are irrelevant to whether it is barred by the statute of limitations. United States v. Kubrick, 444 U.S. 111 (1979).

By first addressing the merits of a claim, the jury, upon finding that the plaintiff had been injured, would have experienced a significant motivation to find against a defendant rather than permit him to escape liability through what may be deemed a technicality.

Examination of the completed verdict forms shows that such motivation may have been at work, for no defendant who was found to have injured a plaintiff was found to be entitled to the statute of limitations defense despite ample evidence demonstrating that the defense was meritorious.

The verdict form was also defective in that it failed adequately to describe the concept of good faith immunity. The verdict form merely asked, "Were any of the following defendants immune from responsibility as found in no. 1 above?" The concept of immunity from liability is not one which a jury of laymen could be expected readily to understand; therefore, the verdict form should have included the language, "Did the defendant believe reasonably and in good faith that his actions were proper?" The absence of this descriptive material effectively deprived the jury of the opportunity to deliberate fairly the issue of immunity.

These defects in the verdict form prejudiced the defendants.

F. The Verdict Is Contrary To The Weight Of The Evidence

The jury found that each federal defendant had injured each plaintiff by individual action. Each plaintiff was awarded $32,812.50 in damages from the federal defendants.

Analysis of the verdict forms shows that damage awards were arrived at though a method of rigid arithmetical calculation. The jury first set a total damage award of $750,000.[4/] The total amount was then distributed among the defendants, and, finally, the jury divided damages equally among the plaintiffs.

4/ The total award was reduced following further deliberation with respect to plaintiffs Booker, Eaton, and Hobson.

Although arithmetically precise, the damage awards bear no relation to the evidence. Each plaintiff had different experiences and was affected by different events. Identical awards to each plaintiff cannot be justified under the evidence. No evidence supports the finding that each of the federal defendants engaged in individual action against each plaintiff; in fact, there is no evidence that any defendant injured all of the plaintiffs.[5/] There is, furthermore, no rational basis for the jury's assessment of equal awards as against defendant Jones and defendant Pangburn.[6/]

Although the jury took great care in their calculations, they clearly did not follow the instruction that the verdict be based on the evidence. The federal defendants are entitled to a new trial.

G. The Verdict Is Excessive

Plaintiffs Pollock, Bloom, Abbott, Waskow, and Washington Peace Center were each awarded $93,750 in damages. Plaintiffs Hobson, Eaton, and Booker were each awarded $81,062.50. These awards are clearly excessive.

In Carey v. Piphus, 435 U.S. 247 (1978), the Supreme Court ruled that in the absence of proof of injury plaintiffs alleging violation of procedural due process rights may win only nominal damages. Since in the instant case plaintiffs suffered no actual injury, nominal damages are appropriate if liability is to be found. But even if the Court should find that the jury could have found actual injury, the awards are excessive. The case of Dellums v. Powell, 566 F.2d 167 (D.C. Cir. 1977), provides a useful comparison. The jury had awarded $7,500 to each person

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5/ See part I, supra, for discussion of plaintiffs' injuries and defendants' actions.

6/ When the jury began deliberating, counsel prepared, and the Court sent into the jury room, brief descriptions of the parties. Comparison of those descriptions with the total awards against the federal defendants indicates that the descriptions, rather than the evidence, governed the relative awards. Both defendant Jones and defendant Pangburn held supervisory positions in the Washington Field Office, and so the jury made equal awards, even though the evidence did not show they had acted equally toward plaintiffs.

who had been arrested during a demonstration on the steps of the U.S. Capitol. Even though the class members had suffered an actual, serious, and immediate deprivation of constitutional rights, the Court of Appeals found the award to be totally out of proportion to any harm actually suffered. 566 F.2d at 195-96. That observation applies with greater force here where no actual deprivation or interference occurred but the award was more than 10 times greater than the award to each class member in Dellums.

In addition there was no evidence to support the award of punitive damages against the federal defendants. Punitive damages are appropriate only where malicious and abusive conduct has been proved to have occurred. See Carey v. Piphus, 435 U.S. 247 (1978). As demonstrated in part I, supra, no evidence supports such a finding in this action.

CONCLUSION

For the foregoing reasons, federal defendants are entitled to judgment notwithstanding the verdict or, in the alternative, a new trial.

Respectfully, submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action
	)	76-1326
JERRY WILSON, et al.,	)	
	)	
Defendants.	)	

ORDER

This cause having come before the Court on motion by defendants Brennan, Moore, Jones, Pangburn, and Grimaldi for judgment notwithstanding the verdict or, in the alternative, for a new trial, and the Court being fully advised in the premises, it is this _____ day of _____, 1982,

ORDERED that the verdict and the judgment entered in favor of plaintiffs on December 23, 1981, be, and hereby are, set aside and that judgment be entered in favor of defendants Charles D. Brennan, George C. Moore, Courtland J. Jones, Gerould W. Pangburn, and Gerald T. Grimaldi; and it is further

ORDERED that, if, and only if, the foregoing judgment be reversed on appeal, then and in that event the verdict of the jury and the judgment entered in favor of plaintiffs on December 23, 1981, be, and hereby are, set aside, and a new trial be, and hereby is, granted to defendants Brennan, Moore, Jones, Pangburn, and Grimaldi.

_____
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify on this 4th day of January, 1982, I have served upon each counsel, by mailing postage prepaid, one copy of the foregoing Motion By Defendants Brennan, Moore, Jones, Pangburn, and Grimaldi For Judgment Notwithstanding The Verdict Or, in the Alternative, For New Trial, accompanying memorandum of points and authorities, and proposed ORDER.

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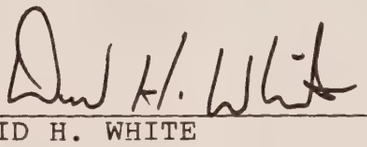

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs	)	
v	)	Civil Action No. 76-1326
JERRY WILSON, et al., Defendants	)	

ORDER

Upon consideration of the plaintiffs' motion for sanctions under Rule 37(d) of the Federal Rules of Civil Procedure against Ann Kolego Markovich and the District of Columbia, it is hereby ordered that:

Ann Kolego Markovich and the District of Columbia shall pay forthwith to counsel for the plaintiffs the sum of $ as sanctions for the failure, without proper excuse, of defendant Markovich to appear for her deposition in this case.

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs	)	
v	)	Civil Action No. 76-1326
JERRY WILSON, et al., Defendants	)	

SUPPLEMENTAL MOTION FOR SANCTIONS
AGAINST DEFENDANT DISTRICT OF COLUMBIA
AND ANN KOLEGO MARKOVICH

The plaintiffs hereby move the Court pursuant to Rule 37(d) of the Federal Rules of Civil Procedure to order the defendant District of Columbia and Ann Kolego Markovich to pay the reasonable expenses, including attorneys fees, incurred as a result of the failure of defendant Markovich to appear for her deposition noticed for May 26, 1981.

As grounds for their motion, plaintiffs state, as appears more fully in the attached memorandum, that defendant Markovich's failure to appear for her deposition on May 26, 1981 or at any later time was willfull and prejudicial to the plaintiffs since she later appeared and testified in her own behalf at trial.

Dated:

Respectfully submitted,

Anne Pilsbury

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J. E. McNeil

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs	)	
v	)	Civil Action No. 76-1326
JERRY WILSON, et al., Defendants	)	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF SUPPLEMENTAL MOTION
FOR SANCTIONS AGAINST DEFENDANTS
DISTRICT OF COLUMBIA AND MARKOVICH

Ann Kolego Markovich, a defendant, failed to appear for her own deposition noticed by the plaintiffs for May 26, 1981. Plaintiffs' counsel, Anne Pilsbury, had traveled to Washington, D.C. from Maine to take her deposition along with other D.C. defendants and witnesses, each scheduled for approximately a half day each May 26, 1981 - May 29, 1981.

Counsel was informed by then counsel for the D.C. defendants, William Earl, Esq., that Ms. Markovich's whereabouts were unknown. Since Ms. Markovich had retired from the police force, plaintiffs accepted at face value the representation of opposing counsel that he could not locate defendant Markovich. (See also affidavit of J.E. McNeil filed with plaintiffs' earlier motion to bar Ms. Markovich from testifying at trial.)

Plaintiffs were caught totally by surprise when, almost at the close of their case, they were informed that Ms. Markovich was available, was going to testify as a defendant, and had been present in court during much of the plaintiffs case during which her activities as "Crazy Annie", an undercover informant, had been discussed.

Trial counsel for the D.C. defendants, Laura Bonn, Esq., and George Barclay, Esq., claimed to be unaware that the plaintiffs had been trying to depose defendant Markovich, although the file noted the deposition and surely they were aware that no deposition had been taken.

The Court attempted to cure the prejudice created by this situation by ordering Ms. Markovich to be available for a last minute interview by plaintiffs' counsel which took place at 5:00 p.m. on December 8, 1981 in the presence of counsel for the D.C. defendants and Anne Pilsbury, Esq. for the plaintiffs. At this interview, which was not on the record or under oath, Ms. Markovich said she "had heard someone was looking for me" this past spring to take her deposition in connection with this case. She claimed to have been in touch with William Earl who, she said, had her telephone number but probably not her address.

Without questioning Mr. Earl, it is impossible to know whether Ms. Markovich's failure to appear was the result of a failure of communications between counsel and client or was an intentional effort to thwart discovery. From the plaintiffs' viewpoint, the prejudice is the same. As a defendant whose deposition was properly noticed, both Ms. Markovich and her counsel had a duty to appear, or if unavailable, to tell plaintiffs when the defendant would be available.

The prejudice here is clear. Without a chance to depose the defendant, plaintiffs could not prepare for her testimony, had no opportunity to follow up leads her deposition might have suggested, and had no basis from which to cross-examine her. The jury's finding in her favor eliminates any possibility that her non-appearance was "harmless" error. Plaintiffs earlier moved that she be barred from testifying. The Court denied that motion but indicated it would entertain a motion for alternative sanctions. The plaintiffs submit that an appropriate alternative sanction would be for defendant Markovich and the District of Columbia to be made jointly and severally responsible for the counsel fees and costs

of the deposition she failed to attend.

Dated:

Respectfully submitted,

Anne Pilsbury

Anne Pilsbury
17 Danforth Street
Norway, Maine 04268
(207) 925-1144

Of Counsel:

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Executive Director
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Attorneys for plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al., Plaintiffs v JERRY WILSON, et al., Defendants	Civil Action No. 76-1326

AFFIDAVIT OF ANNE PILSBURY

I, Anne Pilsbury, being duly sworn do depose and state as follows:

1. I have been an attorney of record in Hobson v Wilson since the case was filed on July 16, 1976.

2. I am licensed to practice law in the District of Columbia and State of Maine. I received a J.D. from Antioch School of Law in May, 1975 and was admitted to the Bar of the District of Columbia in November, 1975. I received a B.A. degree from Penn. State University in 1965; a M.A. degree from American University in 1967.

3. I am at the present time and have at all times since this suit was filed been actively engaged in the practice of law, either as a sole practitioner or, briefly, in a small firm in 1975-1976.

4. During the early phases of the case, from January 1976 through 1977, I worked under the supervision of David Rein, Esq. who was the senior attorney on the case. I acted as his assistant, did most of the leg-work, contacting plaintiffs, investigation, initial drafting of pleadings, research and filing, and review of F.B.I. files on plaintiffs. Mr. Rein took an active part in the case and I did nothing without his approval. Although I would estimate he put in only about one-quarter to one-third of the time I did during this period, his time was obviously much more valuable

than mine. At that time (1976-1977), my normal billing fee was $40.00 an hour.

5. After moving to Maine to practice law in late 1977, I did not take an active role in the case until 1981. I reviewed the pleadings during this period and kept current on legal developments but have not included any time for this period in the breakdown that follows.

6. Starting in 1981, I again assumed an active role made necessary in light of the death of David Rein in August, 1979 and the fact the case was coming to trial. Since by this time, I had had considerable trial experience (state and federal, jury and non-jury trials), and had been in practice for six years, my normal hourly charge for a case of this complexity would be $100.00/hour for in-court trial time and $75.00/hour for trial preparation, depositions and other out-of-court work.

7. I have received no remuneration from anyone for my work to date on this case and have not been paid for any of my overhead or costs except for $187.00 I received to partially reimburse me for a trip to Nova Scotia in September, 1981 to interview former F.B.I. Special Agent Robert Wall.

8. The following is a statement of the time spent to date on this case by year, month and date. All meetings of counsel referred to for 1976 and 1977 took place at the offices of Forer & Rein in Washington, D.C. The typing and xeroxing was shared about evenly between Forer & Rein and Anne Pilsbury, Esq.

Counsel Time

Time	1976	Activity
2.0 hours	1/12/76) 1/13/76)	notice to D.C. re: claim; mtg. w/ D. Rein.
1.5	1/21/76	mtg. w/ plfs.; investigation.
1.4	2/11/76	mtg w/ plfs.; investigation.
2.1	2/20/76	mtg. w/ David Rein, Ralph Temple re: facts, plfs.
1.6	3/3/76	investigation; interviews w/ plfs.
2.0	3/4/76	review Cullinan report from D.C.
.8	3/8/76	investigate names of F.B.I. defendants.
.9	3/9/76	investigate names of F.B.I. defendants.
1.5	3/29/76	mtg. w/ David; investigation; research.
2.0	4/8/76	mtg. w/ plfs.; investigation; research.
2.0	4/9/76	mtg. w/ David, BurtWechsler, Ralph Temple.
2.5	5/5/76	review files in I.P.S., other cases.
1.0	5/7/76	mtg. w/ David, Ralph Temple; drafting complaint, research.
2.5	5/14/76	Rich Pollock - mtg.
2.1	5/27/76	drafting complaint; research.
1.0	6/3/76	mtg. w/ Abe Bloom.
1.0	6/7/76	draft complt.; research.
1.0	7/13/76	mtg. w/ David.
1.0	7/16/76	FILED COMPLAINT.
2.5	8/4/76	review F.B.I. interrogatories to plaintiffs.
.8	8/20/76	opposition to Sullivan Motion to Quash service.
2.0	9/9/76	prepare answers to F.B.I. interrogatories.
.5	9/10/76	begin prepare plfs.' interrogatories.
1.5	9/13/76	both of above.
2.0	9/15/76	mtg. w/ David on interrogatories to F.B.I.

1.5	9/16/76	mtg. w/ Abe & Sammie.
1.0	9/20/76	research; motion to quash. (DC)
1.8	9/20/76	rec'd DC answer; motion to quash and motion to dismiss: reviewed same.
1.1 2.1 6.0	9/23/76) 9/24/76) 9/25/76)	preparing plfs.' answers to first set of F.B.I. interrogatories; meeting w/ plfs.; mtg. w/ David Rein; investigation; drafting; tracking down plfs. to sign; filing.
.6	9/27/76	" " "
1.0	9/28/76	" " "
1.5	10/2/76	" " "
6.0	10/14/76	" (Bloom, ECTC, Abbott)
8.0	10/5/76	" (Pollock, WSP)
6.0	10/6/76	" (WPC)
6.0	10/7/76	" (Booker, Hobson)
8.0	10/9/76	more work on plfs'. answers to F.B.I.; also work on plfs. own to F.B.I.
1.0	10/9/76	" " "
.7	10/12/76	" " "
.8	10/13/76	" (Eaton)
2.0	10/15/76	D.C. motion to quash opposition; Jagen & Shoffler.
1.0	10/19/76	draft our interrogatories to F.B.I.
.5	10/22/76	conf. w/ David on our interrogs. to F.B.I.
2.0 .8	10/26/76 10/26/76	prepare our interrogatories to F.B.I. Eaton interrog. to client to sign.
3.5	10/27/76	Plf's. interrogs.to F.B.I.; draft.
.5	10/29/76	file Eaton interrogs. to F.B.I.
1.0	11/1/76	D.C. interrogs. to pltfs.; drafted.
1.5	11/2/76	D.C. interrogs. to pltfs'. drafted.
2.0	11/3/76	serve plfs'. answers to F.B.I. interrogatorie
.1	11/5/76	misc.
.2	11/9/76	misc.
1.5	11/10/76	mtg. w/ David; review status of case.

1.0	11/22/76	mtg. w/ David, Ralph Temple; re: status.
1.0	11/30/76	mtg. w/ David; research.
	Total 1976= 110.9 hours	
	1977	
2.0	1/12/77	motion to compel by plfs.
4.0	1/18/77	mtg. w/ David; review F.B.I. files on plfs.
4.0	1/19/77	review F.B.I. files on plfs.
2.0	1/20/77	review F.B.I. files on plfs.
.8	1/24/77	"
.6	1/25/77	"
1.0	2/11/77	STATUS CALL w/ Judge Pratt.
.5	2/14/77	review F.B.I. files.
.4	2/15/77	"
2.0	3/10/77	"
.2	3/15/77	misc.
1.0	3/15/77	mtg. of counsel; research.
3.0	3/19/77	review F.B.I. files on plfs.
1.0	3/21/77	mtg. w/ David re: informer privilege.
1.0	3/26/77	research on privilege.
2.0	3/31/77	two trial memos & motion; death of Hobson.
2.0	4/4/77	reply to Binsted (DC) motion to dismiss/ quash.
2.5	4/11/77	plfs. interrogs. to D.C.; draft; prepare opposition to Binsted.
1.0	4/14/77	mtg. w/ counsel and research.
1.0	5/10/77	COURT APPEARANCE.
1.0	5/17/77	mtg. of counsel.
2.5	5/19/77	motion to show cause, against D.C.
.6	5/26/77	research; privilege issue re: F.B.I.
1.0	5/30/77	research; privilege.
.8	5/31/77	research; privilege.

1.0	6/28/77	STATUS CALL.
.8	7/12/77	mtg. w/ Dave re: status discovery.
2.0	7/13/77	interrogatories reviewed.
.5	7/14/77	mtg. w/ counsel.
5.5	7/16/77	reviewed F.B.I. files on Wash. Peace Center, Eaton, Pollock, ECTC.
.4	7/18/77	check on request for doc.
1.2	7/20/77	interrog. due; took to court.
1.0	7/21/77	mtg. w/ counsel.
3.0	7/23/77	motion for sanctions against D.C.
2.1	7/26/77	review Eaton file.
.5	9/8/77	mtg. w/ counsel re: amended complaint.
2.1	10/7/77	draft amended complt.
	Total 1977 = 58.0 hours	

NOVEMBER 1977 - DECEMBER 1980 — not active although received and reviewed pleadings.

1981

* 10.0	5/20/81 - 5/21/81	travel to D.C.
6.0	5/22/81	mtg. w/ counsel; prepare for depositions of D.C. defendants.
5.0	5/23/81	review discovery material to date on D.C. defendants.
5.0	5/25/81	" "
6.0	5/26/81	DEPOSITIONS: Kolego and Jagen.
6.0	5/27/81	DEPOSITIONS: Binsted and Binsted.
6.0	5/28/81	DEPOSITIONS: Shoffler and Gildon.
6.0	5/29/81	DEPOSITIONS: Scrapper and Mahaney.
* 10.0	5/30/81	Travel to Maine.
.4	9/81	t/c w. counsel re: trial prep; and Robt. Wall.
.5	9/81	t/c w/ Robt. Wall re: interview.
* 20.0	9/15 - 9/16	travel to Nova Scotia to see Robt. Wall.

3.5	9/16	interview w/ Robert Wall.
*20.0	9/16-9/17	return to Maine
.6	9/22/81	letter to counsel re: trip, trial prep.
.5	10/13/81	t/c w. counsel re: trial prep.
.4	10/19/81	t/c to Robt. Wall re: trial.
.4	10/20/81	t/c w/ Don Gurewitz re: trial.
2.1	10/29/81	interview Don Gurewitz in Cambridge, Mass.
.5	10.31/81	t/c w. Sid Peck re: testimony. (long dist.)
4.0	11/5/81	research; trial preparation.
.3	11/11/81	t/c w/ Sid Peck (long dist.)
.4	11/12/81	t/c w/ counsel re: voir dire; trial.
18.0	11/17/81	TRIAL PREPARATION: preparing charts for each plaintiff; reviewing files; preparing plfs. to testify.
1.0	11/18/81	Pre-trial Conference in Court.
9.0	11/18/81	TRIAL PREPARATION: mtg. w/ plfs.; preparing testimony; voir dire questions.
1.0	11/19/81	Pre-trial Conference (final) in Court.
9.5	11/19/81	TRIAL PREPARATION w/ pltfs.
12.0	11/20/81	TRIAL PREPARATION w/ pltfs. and other witnesses.
10.5	11/21/81	TRIAL PREPARATION for plfs.
12.0	11/22/81	TRIAL PREPARATION for plfs; interviewing Rev. Doug Moore.
8.0	11/23/81	TRIAL BEGINS: picked jury (primary responsibility).
8.0	11/24/81	TRIAL CONTINUES: presented direct exam. Tina Hobson, Abe Bloom.
8.0	11/25/81	TRIAL CONTINUES: presented direct exam. Helen Gurewitz, Rich Pollock.
9.5	11/26/81	Thanksgiving (no court) TRIAL PREPARATION of plfs.
8.5	11/27/81	TRIAL PREPARATION OF plfs. and other witnesses.
7.0	11/28/81	TRIAL PREPARATION of plfs. & other witnesses

9.5	11/29/81	TRIAL PREPARATION of plfs. & other witnesses.
8.0	11/30/81	TRIAL CONTINUES: presented direct exam. of Carol Cullom; Reginald Booker.
4.0	11/30/81	TRIAL PREPARATION for next day.
8.0	12/1/81	TRIAL CONTINUES: presented direct exam. of Arthur Wascow; Sammie Abbott; David Eaton.
4.0	12/1/81	TRIAL PREPARATION for next day.
8.0	12/2/81	TRIAL CONTINUES: Eaton, Sid Peck.
3.0	12/3/81	TRIAL CONTINUES: (F.B.I. witnesses presented by Dan Schember).
3.5	12/3/81	TRIAL PREPARATION for next day.
8.0	12/4/81	TRIAL CONTINUES: presented direct exam of Chas. Brennan.
8.0	12 5 81	TRIAL PREPARATION: D.C. Police case.
6.5	12 6 81	" " "
8.0	12/7/81	TRIAL CONTINUES: (D.C. police witnesses Suter and Acree presented by Dan Schember).
5.0	12/7/ 1	TRIAL PREPARATION for D.C. witnesses.
8.0	12/8/81	TRIAL CONTINUES: presented direct exam of Jerry Wilson, Zelloe, John Mahaney, Chris Scrapper, Blanco Drummond.
.5	12/8/81	interview w/ Ann Kolego.
3.5	12/8/ 81	Trial Prep. for next day.
8.0	12/9/81	TRIAL CONTINUES: reading from Church Report and Winkleman investigation. Plaintiffs rest.
2.0	12/9/81	draft motion for sanctions re: Ann Kolego
8.0	12/10/81	TRIAL CONINTUES: F.B.I. defense; conducted cross-exam of Brennan.
3.0	12/10/81	Trial Prep. for next day.
8.0	12/11/81	TRIAL CONTINUES: DC defense. Conducted cross exam of Jagen and Kolego.
8.5	12/12/81	TRIAL PREPARATION: rebuttal.
5.5	12/13/81	TRIAL PREP. (rebuttal).
6.0	12/14/81	TRIAL CONTINUES: presented rebuttal witnesses: Rev. Doug Moore, Rich Pollock, Abe Bloom, David Eaton and Mayor Marion Barry.

3.0	12/14/81	prepare jury instructions, research.
2.5	12/15/81	mtg. w/ Court on jury instructions.
6.0	12/15/81	prepare closing argument.
6.0	12/16/81	TRIAL CONTINUES: closing argument for plaintiffs.
8.0	12/17/81	TRIAL CONTINUES: jury instructed. Jury out at 12:10 p.m. Jury deliberations begin; hearing on juror matter.
8.0	12/18/81	Jury out: hearing w/ Mary B. Pike on juror matter.
8.0	12/21/81	Jury out.
8.0	12/22/81	Jury out.
8.0	12/23/81	VERDICT (completed at 6:00 p.m.)

TOTAL TRIAL TIME = 159.0 hours

TOTAL OTHER 1981 = 284.10 hours

TOTAL 1981 = 443.10 hours

* Indicates travel time for which a lower hourly rate would be appropriate.

9. David Rein took primary responsibility for the following matters during the period I was his assistant (1976-1977) as well as for overseeing all other matters:

a. Plaintiffs' Opposition to Defendant Kelley's Motion for Partial Reconsideration of June 24, 1977 Order.

b. Plaintiffs' Opposition to claim of Privilege by Attorney General (Oct.1977).

c. Reply to D.C. Defendants' Opposition to Plaintiffs' Motion for Sanctions. (Sept. 1977).

My best estimate of the time he gave to the case from its inception until November, 1977 is about fifty (50) hours.

10. Mary B. Pike, Esq. and Burton D. Wechsler, Esq. assisted counsel during trial in preparation of jury instructions and legal research on the issue of qualified immunity as well as other matters. Affidavits

from each of them will be submitted shortly.

STATE OF MAINE
OXFORD, ss:

I have read the foregoing affidavit and it is true and correct to the best of my knowledge and belief.

Anne Pilsbury

Anne Pilsbury
17 Danforth Street
Norway, Maine
(207) 743-5583
Counsel for plaintiffs

Dated: December 29, 1981

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 29th
DAY OF DECEMBER, 1981.

NOTARY PUBLIC

MY COMMISSION EXPIRES
DECEMBER 1, 1985

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :

Plaintiffs :

v. : Civil Action No. 76-1326

JERRY WILSON, et al. :

Defendants :

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S MOTION FOR SANCTIONS AGAINST ANN KOLEGO MARKOVICH

The District of Columbia defendants respectfully move this Court to deny plaintiff's motion for sanction on the grounds that Ann Kolego Markovich's failure to attend a deposition was not the result of willful conduct since her where abouts at the time of the deposition was unknown to her attorney. As further grounds, defendants submit that plaintiffs were advised of her subsequent willingness to be deposed once contact had been established with her and that plaintiffs simply declined to reschedule her deposition.

Defendants do not dispute that plaintiffs served notice to take the deposition on May 19, 1981 and that deponent failed to appear. Her failure to attend resulted from her counsel's lack of knowledge as to her where abouts and the inability to inform her of the deposition. Further, counsel for defendants informed plaintiffs counsel as to her whereabouts and willingness to be deposed as soon as such information became known, and plaintiffs simply declined to reschedule her deposition. (See Affidavit of William J. Earl attached hereto as Exhibit "A" and by reference made a part hereof.)

In addition, the motion at this time, is moot, said defendant having testified at trial.

Wherefore, based on the foregoing, the District of Columbia defendants respectfully request this Court to deny plaintiffs' motion for sanctions.

JUDITH W. ROGERS
Corporation Counsel, D.C.

JOHN H. SUDA
Deputy Corporation Counsel, D.C.

LAURA W. BONN
Assistant Corporation Counsel, D.C.
Attorney for Defendants
District Building - 324
Washington, D.C. 20004
727-6348

GEORGE N. BARCLAY
Assistant Corporation Counsel, D.C.
Attorney for Defendants
District Building - 318
Washington, D.C. 20004
727-6303

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Sanctions Against Ann Kolego Markovich and Order was mailed, postage prepaid, to Daniel Schember, Esquire; J.E. McNeil, Esquire; and Ann Pillsbury, Esquire, Attorneys for Plaintiffs, 1712 N Street, N.W., Washington, D.C. 20036, this ____ day of December, 1981.

Assistant Corporation Counsel, D.C.
Attorney for Defendants
District Building - 318
Washington, D.C. 20004
727-6303

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al. :

Plaintiffs :

v. : Civil Action No. 76-1326

JERRY WILSON, et al. :

Defendants :

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

William J. Earl, being first duly sworn under oath, deposes and says as follows:

1. I am the Assistant Corporation Counsel, D.C. who represented the District of Columbia defendants in the above-cited case during May 1981.

2. On or about May 12, 1981, I received notice for deposition of Ann Kalego Markovich, a District of Columbia defendant in this case, scheduled for May 19, 1981. Upon receiving this notice, I attempted to contact Ms. Markovich through the telephone number for her contained in the file (that information had been placed there prior to my assignment to the case). When I called the telephone number, I was advised by the individual answering that this was no longer Ms. Markovich's number. I thereafter contacted the Metropolitan Police Department General Counsel's Office for assistance in locating Ms. Markovich, and was advised that her current whereabouts were unknown although it was understood that she had left the jurisdiction. I also thereafter contacted the Metropolitan Police Department Personnel Office and was informed that their records reflected the same address and telephone number for Ms. Markovich which my file contained.

3. On or about May 14, 1981, I called Daniel Schember, Esquire, Attorney for Plaintiffs, and advised him that Ms.

EXHIBIT "A"
C.A. No. 76-1326

Markovich's current whereabouts were unknown to me or to the Metropolitan Police Department and that she had apparently left the jurisdiction. I also at this time gave Mr. Schember the address and telephone number for Ms. Markovich which my file contained.

4. On or about May 29, 1981, Ms. Markovich called me and stated that she had heard that I was attempting to locate her. Later that day she appeared in my office briefly, at which time I advised her that she could anticipate being deposed by plaintiffs in this case in the future; she indicated no reluctance to appear at such a deposition arranged to accommodate her schedule. On that same day, I advised either Mr. Schember or Anne Pilsbury, Attorney for Plaintiffs, that I had been in contact with Ms. Markovich and that her deposition could now be rescheduled. I was then informed that plaintiffs' deposition schedule for June 1981 had already been completed, and that further depositions would be decided upon at a later time.

5. On or about June 5, 1981, when this case was transferred from me to another Assistant Corporation Counsel, I informed that assistant that I had been in contact with Ms. Markovich (her current telephone number was in the file) and that her deposition could be arranged wherever counsel for plaintiffs raised the subject.

6. I never had any discussions with J.E. McNeil regarding the scheduling of Ms. Markovich's deposition.

William J. Earl
WILLIAM J. EARL

Subscribed and sworn to before me this 2nd day of December, 1981.

Linda Hoffman Notary Public

My commission expires: 12/14/82

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JULIUS HOBSON, et al.	:	
Plaintiffs	:	
v.	:	Civil Action No. 76-1326
JERRY WILSON, et al.	:	
Defendants	:	

ORDER

This matter comes before the Court on plaintiffs' motion for sanctions against Ann Kolego Markovich for her failure to attend her deposition on May 19, 1981. Upon consideration of plaintiffs' motion, the opposition of District of Columbia defendants thereto, and the record herein, it is, by the Court, this _____ day of December, 1981,

ORDERED: That plaintiffs' motion for sanctions be, and the same is, hereby denied.

_____
JUDGE